Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

-CAPITAL CASE-

The questions presented in this CAPITAL CASE by the petition are:

1. UNDER THE SIXTH AMENDMENT MAY A CAPITAL ATTORNEY'S TOTAL FAILURE TO INVESTIGATE A CASE FOR MITIGATING EVIDENCE, BASED ON AN ALLEGED, UNMEMORIALIZED "PROMISE" BY THE TRIAL COURT TO PROVIDE THE ATTORNEY A ONE TO THREE WEEK CONTINUANCE BETWEEN THE GUILT AND PENALTY PHASE, FOLLOWED BY A FAILURE TO PRESENT KEY EXCULPATORY EVIDENCE EVER BE CONSIDERED A "STRATEGIC CHOICE"?

2. DOES STRICKLAND v. WASHINGTON'S CAVEAT THAT COUNSEL'S PERFORMANCE MUST BE JUDGED FOR REASONABLENESS WITHOUT THE BENEFIT OF HINDSIGHT APPLY EQUALLY TO A REVIEWING COURT SO THAT A REVIEWING COURT CANNOT CREATE FOR DEFENSE COUNSEL A "STRATEGIC CHOICE" THAT DEFENSE COUNSEL NEVER MADE?

3. MAY A REVIEWING COURT DESCRIBE COUNSEL'S FAILURE TO INVESTIGATE AND/OR PRESENT MITIGATING EVIDENCE IN A CAPITAL PENALTY PHASE AS "REASONABLE" BASED UPON THE THEORY THAT TO DO SO MAY HAVE "OPENED THE DOOR" TO UNFAVORABLE EVIDENCE THAT WAS CLEARLY NOT ADMISSIBLE?

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE BASIS FOR JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A) Basis For Jurisdiction 2

B) Underlying Facts And Proceedings Below 2

C) Facts Pertaining To Questions Presented 4

REASONS FOR GRANTING THE WRIT 18

ARGUMENT I 19

ARGUMENT II 24

ARGUMENT III 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page No.

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), cert. denied 504 U.S. 943 (1992) 22

Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994) 24

Burger V. Kemp, 483 U.S. 776 (1987) 20

Dibble v. State, 347 So. 2d 1096 (Fla. Dist. Ct. App. 1977) .. 27

Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied 501 U.S. 1259 (1991) 26

Geralds v. State, 601 So. 2d 1157 (Fla. 1992) 27

Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), cert. denied 493 U.S. 1011 (1989) 22

Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991), amended 939 F.2d 586 (8th Cir. 1991), cert. denied 502 U.S. 1050 (1992) 21

Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) 26,27

Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), cert. denied 503 U.S. 952 (1992) 22

Jackson v. State, 451 So. 2d 458 (Fla. 1984), cert denied 488 U.S. 871 (1988) 27

O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996), cert. denied _U.S._, 136 L.Ed.2d 681, 117 S. Ct. 742 (1997) 22

Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) 23

Strickland v. Washington, 466 U.S. 668, (1984) .....*passim*

Thomas-Bey v. Smith, 869 F. Supp. 1214 (D. Md. 1994), aff'd 67 F.3d 296 (4th Cir. 1995) 21,23

Page No.

Tison v. Arizona, 481 U.S. 137 (1987) 3

Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), cert. denied 499 U.S. 932 (1991)..... 2,3

Van Poyck v. State, 694 So. 2d 686 (Fla. 1997) 1

ADDITIONAL AUTHORITIES:

Sixth Amendment, U.S. Constitution

NO. _____

IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner William Van Poyck, a state prisoner under sentence of death, respectfully moves this Honorable Court to issue a writ of certiorari to review the opinion of the Supreme Court of Florida, entered on March 27, 1997, with rehearing denied on May 27, 1997.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (a 4-3 split decision) is reported as Van Poyck v. State, 694 So. 2d 686 (Fla. 1997), and appears in Petitioner's Appendix at A1 through A30. The trial court decision on Petitioner's Rule 3.850 motion appears in the Appendix at B1 through B12. The Supreme Court of Florida's order denying rehearing appears in the Appendix at C1.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The opinion of the Supreme Court of Florida sought to be

reviewed was rendered on March 27, 1997.

2. Petitioner's timely motion for rehearing was denied on May 27, 1997.

3. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1257(a), and Rule 10(c).

CONSTITUTIONAL PROVISION INVOLVED

This Petition raises issues under the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Basis For Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to Rule 10(c), Rules of The Supreme Court of The United States, in that the court below, the Supreme Court of Florida, has decided important constitutional questions in a way which conflicts with relevant decisions of this Court. The issues raised herein were first reviewed in a Petition filed in the trial court as a post-conviction collateral proceeding under Rule 3.850 of the Florida Rules of Criminal Procedure. They were then raised in a timely appeal to the Supreme Court of Florida.

B. Underlying Facts And Proceedings Below

The evidence presented at Van Poyck's original trial has been summarized by the Florida Supreme Court. Van Poyck v. State, 564 So. 2d 1066, 1067-68 (Fla. 1990). Briefly, the record reflects

that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, an inmate at Glades Correctional Institution, to a dermatologist's office. After they pulled into a parking space behind the office, they were confronted by Van Poyck and his co-defendant, Frank Valdez, who were both armed. Van Poyck took Turner's gun and forced him under the van. While under the van, Turner "saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground." Id. at 1067. The Florida Supreme Court held that this evidence was insufficient to establish first degree premeditated murder against Van Poyck, but affirmed Van Poyck's first degree murder conviction on the basis of felony murder. Id. at 1069.[1] This Court subsequently denied certiorari review, Van Poyck v. Florida, 499 U.S. 932 (1991).

In December, 1992, Van Poyck filed a motion to vacate the judgment of conviction and sentence pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The Rule 3.850 motion presented a number of issues, including various claims that he was deprived of the effective assistance of counsel.

In February 1994, the trial court conducted an evidentiary hearing on the ineffective assistance of counsel claims. Van Poyck presented a number of expert and lay witnesses, including one of Van Poyck's two court-appointed attorneys; two mental health specialists; an expert in capital defense work; and numerous lay witnesses familiar with Van Poyck's life history. The State called only one

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[1]The Florida Supreme Court upheld Van Poyck's felony murder death sentence by referring obliquely to Tison v. Arizona, 481 U.S. 137 (1987). The Court's entire Tison analysis was set forth at pages 1070-71 as follows:

> Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Thus, the Court upheld a sentence of death in a non-premeditated murder, for a non-triggerman, based upon a finding that Van Poyck "played the major role" in an attempted escape, and "that he knew lethal force could be used." This, the Court found, satisfied Tison, although the Court appeared to justify its finding under a "proportionality" analysis.

witness, Cary Klein, who was Van Poyck's lead trial counsel.

The trial court denied the Rule 3.850 motion in a written order that devoted less than two pages to Van Poyck's claim of ineffective assistance of counsel at the penalty phase. See Appendix at B10 - B12.

Van Poyck appealed the denial of the Rule 3.850 motion to the Florida Supreme Court, specifically addressing the ineffective assistance of counsel issue. On March 27, 1997, a divided Court, split 4-3, affirmed the denial of the Rule 3.850 motion. See Appendix at A1. Justice Anstead, joined by Justice Shaw and Chief Justice Kogan, dissented, describing the case as "a blatant example of counsel's failure to investigate and prepare a penalty phase defense." Van Poyck then filed a motion for rehearing, which the Court denied on May 27, 1997. See Appendix at C1.

C. Facts Pertaining To Questions Presented

Florida, like many death penalty states, dictates by statute that a decision on the death penalty is made in a separate "penalty phase" proceeding in which any existing "mitigating" circumstances are balanced against certain statutorily-prescribed "aggravating" circumstances. Based on this balancing, the jury is to make a "recommendation," which the trial court then either adopts or rejects. Here, in adopting the jury's recommendation of death, the trial court found no mitigating circumstances and four statutory aggravating circumstances.[2] The trial court's sentencing report noted that Van Poyck had been brought up "in a good family and by people that cared for him." R. 4199.[3] The trial court also found

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[2]Two of the statutory aggravators found by the trial court were largely unrelated to the offense and were automatic based on Van Poyck's status. They were that Van Poyck was on parole at the time of the offense and that he had a prior conviction for a prior felony. The other two were a "great risk of death to many" (a factor which has been challenged in both the direct appeal and in post-conviction proceedings) and that the crime was committed for the purpose of effecting an escape from custody.

[3]Citations to the record on direct appeal are referred to as "R. ___."

that "Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis." R. 4199.[4]

The trial court decision may have accurately reflected what was presented at Van Poyck's trial — but it was completely opposite from the truth. There was a wealth of mitigating information regarding Van Poyck's family history, upbringing, environment, mental health, as well as evidence establishing almost to a certainty that Van Poyck did not shoot the victim, but Van Poyck's trial counsel failed to investigate, develop or present any of it. The reasons for these failures, and the evidence that was, as a consequence, never presented has now been well documented and is described below.

Circumstances Surrounding Van Poyck's Representation

Van Poyck's lead attorney, Cary Klein, was a general litigation attorney who had never before handled a capital case. T. 1042-43.[5] As Klein admitted, from the beginning of this difficult, highly publicized case he knew a felony murder conviction was a virtual certainty, and that the case would almost certainly go to a penalty phase proceeding. T. 1143. While at the outset of the case Klein did discuss potential mitigation with Van Poyck (T. 1061-62), Klein never investigated for mitigation at any time prior to the trial. Instead, he had decided to wait until the guilt phase of the trial was

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[4]The special verdict form did not indicate definitively how the jury answered this question, but did indicate that at least one and perhaps as many as eleven jurors believed Van Poyck to be the shooter. Under the heading first degree murder the form contained blanks for "premeditated murder," "felony murder" and "both." The jury was instructed that they were to check the "felony murder" and "premeditated murder" blanks only if their verdict was unanimous on those issues but.that if any of them believed that he was guilty of both then that box should be checked as well. The jury checked the box for "felony murder" and "both." R. 4138. The sentence of death was by a vote of 11 to 1.

[5]Citations to the Rule 3.850 evidentiary hearing are referred to as "T. ___."

over to begin penalty investigation because he believed that the trial court would give him a one to three week continuance between phases. T. 1160. He explained at the hearing that he was counting on this time to "investigate" penalty phase issues and felt safe in doing so because the court had "assured" him that there would be a few weeks between phases. T. 1160. As it turned out, no continuance was forthcoming, and the record contains no written or oral order or promise of a continuance. See T. 1198.

A few months before trial, attorney Michael Dubiner was appointed to assist in Van Poyck's representation with respect to discovery matters. T. 822-23. Dubiner's appointment came over his objection (he had made a personal decision that he would no longer accept capital cases). T. 822-23. Sometime thereafter Dubiner's role changed, again over his objection. He was informed by the court that he was to assist Klein as trial counsel on the case. T. 823. At the time of his appointment as trial counsel, in July 1988, Dubiner had between 15 and 20 trials set before the Van Poyck case. Moreover, because his appointment came so late he spent most of his time just catching up. App. 4, Dubiner Aff. ¶ 3; T. 826-27.[6] Though he had more experience than Klein, he was not lead counsel and did not know the case well enough to be lead counsel. T. 827. He did no work on the penalty phase prior to trial, but assumed that penalty phase investigation and preparation was being handled by Klein. T. 827.[7]

When the jury convicted Van Poyck of first-degree murder, the court announced that it would begin the penalty phase the next day. Dubiner then learned to his dismay that his assumption that Klein had been handling penalty phase preparation was wrong. T. 866-

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[6]Citations to the appendices filed in the Rule 3.850 proceeding, admitted into evidence at the 3.850 hearing as Defense Exhibits 6 through 11, are referred to as "App. ___."

[7]This assumption, very much mistaken, highlights a major problem with the way in which counsel handled this case--there was no clear division of responsibility (App. 4, Dubiner Aff. ¶ 4; T. 684, 1006), little communication and no thought given or coordination between the attorneys as to any kind of defense theory, particularly in the penalty phase. T. 690-91, 818, 839; App. 4, Dubiner Aff. ¶ 10.

67. Klein had arranged for no investigation of the life history of his client, no mental health evaluations, no witness interviews — in short, literally nothing had been done with respect to a penalty phase investigation or preparation. T. 867, 923, 974.

At that point Dubiner realized that Van Poyck was essentially defenseless. Having done penalty phase work before, he knew that even the three weeks Klein thought he would have between phases, let alone the one evening they now had, was not nearly enough time to investigate and prepare a penalty phase from scratch:

> Q: How much time did you think that you would have?
>
> A: My recollection of somewhere between a week and three weeks. I can't recall exactly.
>
> Q: All right sir. Was that adequate time to investigate a penalty phase from scratch?
>
> A: No. That was an adequate time to, you know, clear up the loose ends in the Phase II but not enough time to begin preparation for a penalty phase.

T. 849-50. When Dubiner found out that no mental health evaluation and no penalty phase preparation had been done, he engaged in a heated exchange with Klein and threatened to report him to the court if a mental health evaluation was not arranged. T. 851-52; App. 4, Dubiner Aff. ¶ 18. At the hearing, Dubiner admitted that he should have simply immediately reported the matter, since there was no possibility that any kind of effective or adequate mental health evaluation could be done in a single day. T. 851-52, 926. Klein agreed that he would have done the same had he been in Dubiner's position. T. 1221.

The next morning Klein told the court that if the jury was going to be brought back that day, the defense was not prepared to go forward. The court responded that the penalty phase would start that day, and that Klein could have mental health evaluations done that afternoon. R. 3130-34. Klein told the court that the mental health experts would be unable to see Van Poyck that afternoon. Dubiner added that no prejudice would result from a week's delay and that

otherwise the defense would be unable to present "whatever evidence there is in mitigation." R. 3134. The court nonetheless began penalty phase proceedings that day, allowing only a one day hiatus the next day for any mental health testing.

Klein then "scrambled" to arrange for testimony from a few family members. T. 1200. The last-minute testimony included that of Van Poyck's brother Jeffrey, who had 19 prior felony convictions, an obvious interest in the outcome and was, according to Klein, "the most cold and chilling witness [he] had ever seen" and was "hated" by the jury, T. 1104; Van Poyck's aunt, who had to admit she knew little about the defendant; his stepmother, who not surprisingly gave no indication of the "highly destructive environment" she had created as reported by the HRS in 1970, see p.11, infra; and a nurse who had met Van Poyck in prison.

Counsel did not meet any witnesses until the morning of the hearing, much less interview or prepare them before testifying, T. 857-58; App. 4, Dubiner Aff. ¶ 19, and there was no opportunity to make any reasoned evaluation of whether to put them on the stand. App. 4, Dubiner Aff. ¶ 19. Much of their testimony came off, as expert capital trial attorney Carol Haughwout put it, as though they "were there were for the State." T. 988. The attorneys did not even recognize Van Poyck's aunt when she was in the courtroom and would have lost her testimony had the court not noted her presence. T. 861. As a result of the total lack of preparation and investigation, Klein was left with mere suspicions of a number of mitigating circumstances, none of which, by his own admission, he could show. (T. 1106, "I must have listed 12 or 13 nonstatutory that we could not actually prove other than the couple that we tried to prove that I suspected were there but none we could show").

Dubiner testified that had he known of Van Poyck's mental health diagnoses, abuse as a child, and institutional and prison system abuses, the defense "absolutely" would have presented such evidence. T. 867-68. Obviously, counsel did not make a reasonable decision, after timely and appropriate investigation, not to present this mitigating evidence. Nor did counsel make any reasonable investigation into mental health issues. Instead, counsel "ran out of time in our attempt to determine whether Bill suffered from

a mental illness." Ex. 22, Klein Aff. ¶ 12. The fact that counsel "ran out of time" was a result of their failure to investigate and prepare prior to trial, as well as the reliance on a non-existent continuation between phases. In a capital case, particularly a capital case where counsel characterized the guilt phase defense as a "dead dog loser," T. 862, this was inexcusable, and counsel's performance fell far below that of reasonably competent counsel.

At the evidentiary hearing, capital defense expert Carol Haughwout's unrebutted testimony established that the trial record, counsel's time sheets and other material revealed a complete lack of investigation or preparation for penalty phase: "My opinion from reading all the records is there was no preparedness. There is just no indication other than reviewing the prison records that there was anything done for Phase II." T. 974 (emphasis supplied).

The Available — and Unpresented — Evidence of Mitigation

The evidentiary hearing also showed the vast array of mitigation evidence that was available had counsel only sought it. Counsel's failure to seek this evidence occurred despite the fact that counsel was aware of certain key facts that should have prompted such an investigation. These included the fact that Van Poyck's mother had died when he was very young, that all three of the Van Poyck children had significant legal and emotional problems, and that the household in which he grew up was "bizarre." T. 1173. Counsel never investigated these facts, never talked to key family members, never obtained records concerning the family dysfunctions, never presented any of this information to a mental health expert, and did not, until the day before the penalty phase was to begin, have a psychiatric examination of his client.

Counsel never talked to Emily Wilkes and Charles Warren Hill, cousins of Van Poyck who were adults when he was growing up and were familiar with the family situation. At the evidentiary hearing, they testified that Van Poyck's mother, Phyllis, died in a tragic accident when he was less than two years old. T. 375, 401. Van Poyck's father, Walter — a World War II veteran and amputee who never expressed love toward his children — was devastated by his wife's death and further withdrew from his children, devoting

himself totally to his work and political activities. T. 376, 405-07.

All of the children — Van Poyck, his sister Lisa, and his brother Jeff — had trouble dealing with the death of their mother. T. 402. Though his father engaged a series of housekeepers to care for his children for the next few years, none was competent to provide the kind of care or supervision needed after the death of Ms. Van Poyck. One was a religious fanatic who physically abused the children. Apps. 18, 22. Another was an alcoholic. T. 377.

If counsel had investigated, they would have learned that one of the housekeepers, Ms. Dano, frequently beat Van Poyck and his siblings with wooden coat hangers, leaving bruises, and locked them in closets or out of the house. She threatened to chop them into pieces and feed them to the dogs if they told their father. Apps. 18, 22. Van Poyck's brother Jeff also frequently abused him, beating him often, on one occasion knocking him unconscious with a wooden "shield," and on several occasions holding him under water until he nearly drowned. T. 457; App. 22.

Eventually, Van Poyck's great aunt, Phyllis, moved into the household to care for the children. Phyllis had been diagnosed as suffering from Major Depression and was being treated with Electroconvulsive Therapy, or ECT. App. 29. She was later diagnosed as bipolar and treated with Lithium. App. 30. Aunt Phyllis was subject to violent mood swings; drank heavily, frequently to the point of intoxication; abused pain killers and other prescription drugs; and was generally erratic and unstable. T. 378-80, 409-11. One family member described her as "just a number one crackpot" and "psychotic." T. 409.

All of the Van Poyck children were upset when Walter remarried, to a woman named Lee Hightower. After the marriage, Lee was frustrated at her inability to control the Van Poyck children, and instituted severe "discipline", including physical abuse of Van Poyck especially, whom she tried to beat into following her rather than Jeff (who was already involved in illegal activities). Apps. 22, 26. Lee beat him at least two to three times a week on schedule, using a belt buckle, to teach him not to be like Jeff. When the bruises were too noticeable, she kept him home from school. Apps. 22, 23.

A contemporaneous HRS report — which was in Van Poyck's Department of Corrections file and was never seen by trial counsel (T. 1129-33) — described Van Poyck's mother as "totally destructive in her open, maniacal hostility towards the children and her fanatical attitude of puritanical virtue that she bestows upon herself and evil and corruption which she assures reside in the children." The report went on to recommend "revocation, not as a means of rehabilitating, but as a means of immediately removing [Van Poyck] from a highly destructive environment." Ex. 3.[8]

Again, counsel should have known or suspected the fact that Van Poyck was seriously abused, based on what he and his brother told counsel, and on the fact that Van Poyck was sent to the Florida School for Boys in Okeechobee, which was already a notorious institution at the time of trial. T. 971. Klein, however, did nothing, although he acknowledged that he would have investigated if he had known about Okeechobee, T. 1017, and if he had had time to talk to anyone in the family other than a brief conversation with Van Poyck's stepmother and brother. T. 1034.

Van Poyck was sent to youth hall for the first time at age 12. Shortly after he arrived there, he was raped. Two years later, he was sent to the Florida School for Boys at Okeechobee. At Okeechobee, Van Poyck was hog tied, drenched in water and left over night in the "wet room," and frequently sent to the "ice cream room," where he was given thirty licks with straps and paddles, the process being repeated if he cried out during the beating. T. 486, 498; App. 32. He also witnessed other children being sexually abused, and was placed under the supervision of older and larger offenders. T. 205-09. The substandard conditions at Okeechobee are well documented, see generally App. 37, and were described in detail at the evidentiary hearing by juvenile justice expert Paul DeMuro. DeMuro described the dangerous, overcrowded conditions in the dormitories, where status offenders were not separated from violent offenders, nor smaller children from larger, leading to frequent physical and sexual assaults on the younger and smaller children; the absence of any attempt to treat or rehabilitate youth-

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[8]Citations to exhibits introduced at the 3.850 hearing are referred to as "Ex. ___."

ful offenders; and the fact that small, middle class white boys without a history of institutionalization (like Van Poyck when he was first sent to Okeechobee) were at the greatest risk. T. 319-32.

As set forth above, in 1970, the Department of Health and Rehabilitative Services determined that Van Poyck needed to be removed from the "highly destructive environment" of his home. Ex. 3. Psychiatric testimony established that such recommendations are made with great reluctance, because removing a child from the home causes a major loss and psychological dilemma for the child. T. 584-85. Okeechobee, however, was incapable of providing the type of treatment that such children need. T. 332.

Van Poyck was convicted for robbing a restaurant in 1972 and sent to adult prison at age 17. There, the first recorded evaluation of his mental health was conducted by Dr. David Rothenberg. Dr. Rothenberg's evaluation concluded that Van Poyck was psychotic and recommended long-term in-patient treatment. Ex. 4. Klein did not recall having seen the synopsis of this report, although it was contained in a 1972 post-sentence report. T. 1168. A recommendation of long term in-patient treatment for an adolescent is basically a recommendation to start over "from scratch," using intense interaction with staff to attempt to repair the damage that has already been done to the child. T. 217. But there is no indication in the records that the recommendation was followed up on. Instead, Van Poyck was sent to Sumter Correctional Institution, a "gladiator school" where young inmates like Van Poyck were at extreme risk, T. 418, 481-82, and where he was raped. T. 211, 341, 292.

Approximately two years after being sent to adult prison, Van Poyck suffered a breakdown. For most of the next several years he received psychiatric treatment and medication, including "industrial strength" dosages of antipsychotic medications, and two admissions to the Florida State Hospital in Chattahoochee. T. 595-605; see generally Exs. 23, 24. Dr. Rothenberg testified that this breakdown was the predictable result of the failure to provide the type of long term in-patient treatment he had recommended back in 1972:

This subsequent history confirms my initial diagnosis. It is

> predictable and almost inevitable that a young and vulnerable person, already suffering from psychosis, would deteriorate further when placed in an adult prison, without any therapeutic intervention. In the absence of the type of therapeutic intervention that I recommended, there is no reason to believe that Mr. Van Poyck's mental illness has ever dissipated. While the observability of such a mental illness fluctuates over time and may be masked by medication, the mental illness itself persists.

App. 46.

The psychiatric records clearly reflect that Van Poyck suffered from a serious thought disorder. As expert witness Dr. Phillips testified at length at the 3.850 hearing, that conclusion is supported by the diagnoses, including multiple diagnoses of paranoid schizophrenia, the lengthy history of treatment with anti-psychotic medications, the two admissions to the Florida State Hospital, and the attempts at self-harm. T. 596-605. Contrary diagnoses, such as anti-social personality disorder, or malingering, are inconsistent with the lengthy history of Van Poyck's mental disorder and treatment with powerful anti-psychotic medications. T. 622, 782-84, and are often lazy diagnoses applied by inexperienced practitioners who are unwilling or incapable of performing the proper clinical work to offer a qualified opinion. T. 480. Accordingly, Dr. Phillips diagnosed Van Poyck as having suffered from atypical psychosis by history. T. 623.

In addition to his history of mental illness, Van Poyck has a personality disorder with immature and dependent features. T. 633, 747-49. Dr. Phillips described that where one parent is lost, as Van Poyck lost his mother, the child's "relationship with the surviving parent then becomes extraordinarily important in the development of the child." T. 582. Where the surviving parent is distant from or does not interact appropriately with the child, as was the case with Van Poyck's father, it "has a significant impact on the stability and development of that child's personality and such was the case with Mr. Van Poyck." T. 583. Unfortunately, Walter Van Poyck utterly failed to fill the void left by the loss of Bill's mother. Instead, Bill became extremely dependent on his brother, Jeff, despite the fact

that Jeff physically abused him and corrupted him by exposing him to alcohol, drugs and criminal activities. T. 184-85, 194-96, 233-36, 414, 442-43.

In Florida State Prison, Van Poyck met and was befriended and protected by an older inmate, James O'Brien. Van Poyck quickly became equally dependent on O'Brien. T. 513-14. In fact, O'Brien took the place, and essentially became the personification of, Van Poyck's lost father. T. 617. Van Poyck developed a fierce loyalty to O'Brien because "in doing that he replaces internally something which he never had as a child." T. 618.

Evidence was presented that Van Poyck suffers from diffuse organic brain syndrome, which is currently in remission. In Dr. Phillip's opinion, this organic brain syndrome was caused by one or more of the following: his mother's drinking during pregnancy, his multiple head injuries, or his chronic polysubstance abuse. T. 609-10. The organic brain syndrome is exacerbated by the use of alcohol and drugs, and by the more complex tasks that have faced Van Poyck during the periods when he has not been institutionalized. T. 699-700, 703-07. There have been no incidents since Van Poyck's current incarceration that would have caused or exacerbated this condition; therefore, it was present at the time of the offense, as well as for some considerable time prior to the offense. T. 615.

Mr. Van Poyck's impairments were not just historical; they were especially prominent at the time of the offense and drove his behavior. At the time of the offense, he was living with Traci Rose, a now recovering alcoholic. Mr. Van Poyck met Ms. Rose after his release from prison on parole. They saw each other frequently and then moved in together after a brief period during which Ms. Rose was absent from the area. During the time that Ms. Rose saw Mr. Van Poyck and then lived with him, the two drank constantly and heavily when they were together—over a liter of whiskey, vodka or other alcohol a day. T. 338-41, 344-45. Mr. Van Poyck had little idea what to do outside of the structured prison environment to which he had become accustomed, and tended to do whatever others were doing, including alcohol and drugs. T. 343, 345-46.

About a week before the offense, in addition to the alcohol and marijuana use, which continued, Ms. Rose and Mr. Van Poyck started doing cocaine together. They would snort as much as two and a half grams of cocaine in a night. T. 347-48. The day before the offense, Ms. Rose and Mr. Van Poyck spent the whole day, starting around 2:00 p.m., drinking and taking cocaine. They stayed up all night, periodically snorting more cocaine. Before he left at about 7:00 a.m., Mr. Van Poyck did another line of cocaine, and took some more cocaine and beer with him. T. 350-54. Ms. Rose further testified that cocaine gives the user an instant euphoria, followed by a period in which events are hazy and distorted, the judgment is impaired, and the user is edgy, fidgety and less inhibited. These symptoms last until the user sleeps off the effects. T. 354-56.

Dr. Phillips testified that Mr. Van Poyck's organic brain syndrome was "most prominent at the time of the instant offense and throughout the period of time when he was aggressively using alcohol" and drugs. T. 704. He opined that this condition, together with Mr. Van Poyck's history of psychosis and suicide attempts, personality disorder with immature and dependent features, and substance abuse, would support a finding of the mitigating circumstance of extreme mental or emotional disturbance. T. 632-33; App. 48. In addition, with respect to the mitigating circumstance of substantial domination by another, Mr. Van Poyck's dependent personality needs in general and in particular with respect to O'Brien "were very powerful psychodynamic factors which substantially influenced his ability to make decisions around the events at the time of this crime. I believe that those factors were powerful, and substantially contributed to the decisions he made with regard to this offense." T. 633-34. Indeed, this was perhaps the most powerful of the many clinical factors that contributed to Mr. Van Poyck's conduct: "I believe his behavior was significantly and compulsively driven by that rather misguided interpretation" of his relationship to O'Brien. T. 748. Finally, based on all of these factors, Dr. Phillips believes that Mr. Van Poyck "substantially lacked the capacity to conform his behavior." T. 634.

The Available — and Unpresented — Evidence that Van Poyck Did not Shoot the Victim

Trial counsel's errors were not confined to a failure to investigate the client's history, but also included a failure to develop and introduce evidence relating directly to the one and only issue addressed at trial — who shot and killed the victim. Serological testing showed that Van Poyck's co-defendant, Frank Valdez, had blood on his clothes of a type that matched that of the victim, and that blood on Van Poyck's clothing did not. Def. Ex. 16. Furthermore, it was undisputed that the victim was shot at close range. R. 1916-18, 2207.

It was critical then that this serological evidence be introduced and argued to the jury as tending to establish, along with the other physical evidence, that Van Poyck did not shoot the victim, but rather, as he testified, that he was taken totally by surprise by the shooting. In fact, Klein seemingly recognized the importance of this type of evidence prior to trial when he requested an adjournment, specifically in order to obtain DNA blood sampling analysis which would have confirmed the initial serological report. He represented to the court that this testing was "crucial" to the case. R. 317. Following this representation, however, no DNA testing was in fact performed. His explanation at the evidentiary hearing:

> Once we determined that the blood on Mr. Van Poyck's clothing could not have been Mr. Griffis', we decided not to go ahead with the DNA testing since it was a lose/lose situation. We could point out perfectly with the blood not being consistent with the DNA at all. That point could only have proved one of two things: The blood on Valdes' clothing was Mr. Griffis' or was not Mr. Griffis'. If we ran DNA and found the blood on Mr. Valdes' clothes, not Mr. Griffis', we gain nothing. By not running the DNA we could argue that Mr. Valdes could have blood on him that could have been Mr. Griffis' and therefore he was most likely the shooter.

T. 1094.

Through this explanation — that the serological evidence would be sufficient to make his point — Klein went on to rationalize his decision not to follow through with DNA testing as a "tactical decision." T. 1094. The problem with this "tactical decision," however, is that Klein never introduced the serological testing that supposedly made the DNA testing unnecessary.

When confronted with this fact at the evidentiary hearing, Klein had to admit that the serologist's report was not offered at trial, and that the serologist was not called at trial. Klein then claimed that the reason for this was that he presented "some indication" of blood type evidence "through the back door":

> A: If I remember correctly we got it in the back door. We got some indication in through one of the other officers, not directly from Tanton, some indication.
>
> Q: Would that be a person who is a qualified serologist?
>
> A. No it wouldn't. In order to call Tanton we would've had to have given up the sandwich for that. I remember we got some evidence in on it and we were satisfied with what we got in without having to give up the sandwich.

T. 1212. In fact, the trial court record reveals that no blood type evidence came in — "through the back door" or otherwise. No witness testified as to blood type evidence at either phase, and it was never mentioned at closing argument for the defense.

In addition to the serological evidence and failure to pursue DNA testing, counsel failed to introduce evidence that the murder weapon was not in Van Poyck's possession. Sales records from a Broward County gun shop indicated that the murder weapon was purchased by Lori Sondik, the girlfriend of Van Poyck's co-defendant, Frank Valdez. Ms. Sondik testified that not only did the murder weapon belong to Valdez, but that he left on the morning of the offense with that weapon tucked in his waistband. Unfortunately, however, she did not testify to this at Van Poyck's trial, but at Valdez' trial, months later. App. 12. Klein responded to Mr. Van

Poyck's requests that he explore this issue by simply saying that it was "being worked on." Dubiner Aff. ¶ 7, App. 4.

In the absence of this evidence, the prosecution was able to convincingly argue that Van Poyck was the shooter. Ironically, while the appellate court ruled that the evidence did not establish this fact, the jury and the trial court may well have based their decision on the death penalty on this all-important issue. At the evidentiary hearing, Klein, when confronted with the fact that this evidence was never introduced, had one final tactical reason: he did not want to "give up the sandwich," or the defense's right to give two closing arguments at the guilt phase of trial. The majority ruled that this was a sufficient "tactical reason" not to present the evidence. Id. at 696. Left unexplained by the majority was how additional "argument" could ever justify a failure to introduce critical evidence, or why, Klein should not at least have presented that evidence at the penalty phase proceeding where the issue was, if anything, more important and there was no "save the sandwich" rule.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to further articulate the circumstances in which a defendant in a capital case is deprived of the effective assistance of counsel as guaranteed under the Sixth Amendment. The Supreme Court of Florida majority which authored the opinion at bar has significantly altered the correct standard of review for a claim of ineffective assistance of counsel, in direct contradiction to the standards first enunciated by this court in Strickland v. Washington, 466 U.S. 668 (1984). If the majority's strained interpretation of Strickland is permitted to stand as law then that court will continue to uphold convictions, and sentences of death, which are inherently unreliable and which violate the Sixth and Eighth Amendments to the U.S. Constitution. This case calls upon this Court to consider (or reaffirm) and delineate the outside scope of a capital trial attorney's Sixth Amendment duty to investigate his client's penalty phase case, and to decide whether, under Strickland, and the Sixth Amendment, a total failure to investigate, and present available mitigating evidence, may in any circumstances be termed "reasonable", and thus not falling below the standard of competency expected of any attorney in a capital case.

The reliability and constitutional integrity of Florida's mechanism for meting out the death penalty — and this petitioner's life — literally depends on whether this court agrees with the majority or minority opinion, of the Supreme Court of Florida.

ARGUMENT I

THE SIXTH AMENDMENT DOES NOT PERMIT A CAPITAL ATTORNEY TO MAKE A "STRATEGIC CHOICE" TO DEFER ALL PENALTY PHASE INVESTIGATION BASED ON AN UNMEMORIALIZED COMMITMENT BY THE TRIAL COURT THAT THERE WOULD BE A TWO TO THREE WEEK HIATUS BETWEEN PHASES AND TO THEN REFRAIN FROM PRESENTING EVIDENCE GOING TO THE KEY ISSUE IN THE CASE—WHO SHOT THE VICTIM—IN ORDER TO PRESERVE THE RIGHT TO MAKE ADDITIONAL ARGUMENT.

The majority opinion, by condoning a complete failure by counsel to investigate mitigating evidence because counsel was expecting a brief post-trial adjournment to conduct such investigation, conflicts directly with the principles of Strickland and its progeny.

In Strickland, this Court set forth its well known, two-prong standard for determining whether defense counsel was ineffective within the meaning of the Sixth Amendment. The Court held:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id. at 687. The decisions below were based on Strickland's first prong — deficient performance. On this issue Strickland estab-

lishes certain basic principals as to when, and under what circumstances, counsel's performance is constitutionally infirm. The key issue in such a case comes down to "reasonableness" in light of "all the circumstances" and "prevailing professional norms." Id. at 688.

Notably, Strickland involved, in part, the duty to investigate, a claim that figures centrally in this case. With respect to that duty, Strickland holds that:

> [S]trategic choices made after thorough investigation of laws and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 690-91.

Strickland thus requires that any decision not to investigate must be "reasonable," and in order to be "reasonable" it must be preceded by, and supported by, some preliminary review of the law and facts. In other words, until counsel makes a reasonable investigation into the law and facts, he cannot make a reasonable strategic decision to forego presentation of any particular line of evidence.

This Court determined what constituted a reasonable level of investigation in Burger v. Kemp, 483 U.S. 776 (1987). In Burger, counsel for defendant interviewed the potential witnesses that could have been called to present mitigating evidence, and made a strategic decision that this evidence would not have minimized the risk of the death penalty. Id. at 794-95. Because of this basic investigation, this Court ruled that counsel made a reasonable determination that he need not undertake further investigation to seek such mitigating evidence. Id. at 795. In contrast, here the failure to investigate and interview witnesses by Klein left Klein unable to make a reasonable determination to not seek such mitigating evidence.

Relying on these basic principles, numerous courts around the country have attempted to delineate the parameters of what constitutes deficient performance under Strickland. These cases — which we submit were correctly decided under Strickland — are impossible to reconcile with the case at bar.

For example, in Thomas-Bey v. Smith, 869 F. Supp. 1214 (D. Md. 1994) aff'd. 67 F.3d 296 (4th Cir. 1995), the issue before the Court was whether trial counsel had been ineffective in consenting to allow his client to be interviewed by the State's psychiatrist, in the "hope" that something favorable might come from it, and in failing to attend that interview to protect his client's rights. Counsel later admitted that he had conducted no investigation into the law, and facts, concerning this issue. In holding that counsel's actions fell below an acceptable standard of competency, the Court, after first reviewing Strickland's mandate that counsel has a duty to investigate, stated:

> The explanation that [defense counsel] Kinsley offers for his consent can only be described as one of desperate hope...Kinsley's actions were neither strategic nor reasonable...such an act of desperate hope is not constitutionally effective because it is neither reasonable nor strategic...uninformed hope is not sound trial strategy...Kinsley's failure to even cursorily investigate or consider the implications of his consent to the interview was not supported by anything approaching a "reasonable professional judgment..." Thus, even if Kinsley's actions were "strategic," they clearly were not reasonable...Kinsley's hope for a positive outcome does not change that fact.

Thomas-Bey, 869 F. Supp. at 1226-27.

In Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991), amended 939 F.2d 586 (8th Cir. 1991), cert. denied 502 U.S. 1050 (1992), the court held counsel to be ineffective in the guilt phase for failing to investigate and pursue a viable defense theory (that others had the motive, means, and opportunity to commit the murder). The court held that counsel could not have made a reasoned decision not to pursue this theory where he had completely failed to investi-

gate it. Id. at 710-12 ("Trial counsel admittedly did not know enough about this evidence to make a reasoned decision not to use it").

In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), cert. denied 493 U.S. 1011 (1989), a Florida capital case, the Court held that the defendant's two trial attorneys had rendered ineffective assistance at the penalty phase. Neither attorney had investigated the defendant's background prior to the penalty phase because each mistakenly believed that the other was doing so. Even though the attorneys received a four day continuance (three days more than was given here) the Court of Appeals found counsel's performance deficient. After first noting that an attorney is not required to investigate every evidentiary lead, the court stated, in keeping with Strickland, that any decision not to investigate must be a reasonable one:

> However, such decisions must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect.

Harris, 874 F.2d at 763.

Similarly, defendant's counsel failed to investigate possible mitigation evidence before trial in O'Guinn v. Dutton, 88 F.3d 1409, 1424 (6th Cir. 1996), cert. denied ___ U.S. ___, 136 L.Ed. 2d 681, 117 S. Ct. 742 (1997). Because of a lack of investigation, counsel presented only one witness, the defendant's mother. The court considered this failure to investigate to be not just ineffective, but said "it strikes closer to total incompetence." Id. at 1424. Because counsel failed to even look for mitigating evidence, there could be no strategic choice not to present mitigating evidence. Id. See also, Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991), cert. denied 504 U.S. 943 (1992) (effective penalty phase preparation cannot await the conclusion of the guilt phase because there may not be enough time to complete the difficult and time-consuming task of assembling mitigation witnesses); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), cert. denied 503 U.S. 952 (1992) ("strategic" decision cannot be reasonable when attor-

ney has failed to investigate the options and make a reasonable choice between them); Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) ("Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.").

Like each of the above cases, Klein's decision not to investigate was the result of neglect, rather than a reasoned judgment or choice. As in Thomas-Bey, supra, Klein pinned Van Poyck's entire penalty phase on an equally "desperate hope" — that the trial judge would grant a one to three week continuance so counsel could conduct the investigation which he had failed to conduct during the previous 18 months. Klein did not "choose" to conduct the defense of Van Poyck's penalty phase with no investigation; rather, he "chose" to depend on the trial court's "promise" of a brief hiatus. It is that "choice" which must be analyzed for "reasonableness". Given the fact that the alleged trial court's commitment never appears on the record, let alone as a written order, and given the fact that one to three weeks is not nearly enough time to prepare a penalty phase defense from scratch, the question is not even close: counsel's performance was deficient for this reason alone.

Driving home counsel's deficiency even further is the fact that on the one issue that was contested at trial—the identity of the shooter—counsel simply failed altogether to present powerful physical evidence. Klein himself testified that he thought he got this evidence in somehow "through the backdoor," but he did not. In any event, his fall back position (developed at the evidentiary hearing through the use of leading, suggestive questions by the prosecutor) — that the failure to introduce the evidence was justified in that it would permit him to make additional argument—is completely unreasonable. First, it is unreasonable to value additional argument over evidence—the "save the sandwich" rule is designed for those situations where there is no evidence. Second, and more importantly, there was nothing to prevent Klein from presenting such evidence in the penalty phase portion of the case, where there was no such rule. In short, the combination of Klein's complete failure to investigate, as well as his failure to present exculpatory evidence on the only issue which was contested at trial—the identity of the shooter—easily leads to a finding of deficient performance. The majority opinion should be reversed.

ARGUMENT II

STRICKLAND DOES NOT PERMIT A REVIEWING COURT TO CREATE, FOR DEFENSE TRIAL COUNSEL, A "STRATEGIC CHOICE" NOT TO PRESENT EVIDENCE THAT COUNSEL NEVER MADE

Why did the majority ignore the wealth of mitigating information presented at the evidentiary hearing? Why did it ignore the fact that Klein so obviously — indeed, as the dissent noted, by his own admission — dropped the ball on penalty phase investigation and in presenting evidence on the triggerman issue? Why, in short, did it, as the dissent noted, at 684 So. 2d 699, go out of its way to "attempt to put the best face on a very bad situation"? There may be two reasons. First, the majority makes much of "unsavory" information contained in Van Poyck's prison record, highlighted by a letter he wrote years before the offense in which he referred to prison guards as "snakes in brown uniforms" and said he knew he would end up on death row for shooting one someday. Id. 694 So. 2d at 692. The second was evidence of certain antisocial diagnoses and malingering.[9] If the majority was relying on these points (and it never really says it is) in finding that Klein's performance was not deficient, it would not excuse its failure to follow Strickland as described in Argument I, but simply erodes Strickland even further.

First, the "unsavory" information on which the majority focuses are things Van Poyck's trial counsel knew nothing about at the time of trial. Hence, that information could not form the basis for

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[9]Indeed, an issue raised below was whether Van Poyck's attorneys could supplement the record with the affidavit testimony of the psychiatrist Klein had quickly examine Van Poyck the day before the hearing. Klein had been permitted to give hearsay testimony that this psychiatrist had diagnosed during that brief examination Van Poyck as a sociopath. In fact, the psychiatrist said nothing of the sort as we later learned when we were able to garner his testimony; he said only that he had not had time to examine Van Poyck due to the shortness of time. Incredibly, the majority, in reviewing the record, labeled Klein's testimony on this point as "convincing," but it really is irrelevant—Klein's performance was, in any event deficient, and this record amply demonstrates prejudice (where the standard is considerably relaxed), from the deficiency. See, e.g., Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994) (prejudice exists where there is a "reasonable probability" that the outcome would have been different).

any "strategic decision." As previously discussed, one of the guiding principles of Strickland is the necessity of a reasonable investigation. Post-hoc rationalizations of the type engaged in by the majority potentially destroy the whole underpinnings of Strickland, which provides a clear message to the capital defense bar, prosecutors and later reviewing courts alike: if there is a reasonable investigation, any reasonable decision based on that investigation will not be questioned. By the same token, however, the message must also be: if there is a failure to investigate, no "strategic decision" based on evidence that was never discovered will be attributed to defense counsel. These twin messages are critical, not only to discourage an overabundance of post-conviction attacks on trial court performance (as the court noted in Strickland) but also to ensure the level of trial counsel performance guaranteed by the Sixth Amendment. It was for that reason, to "avoid the distorting effect of hindsight," that Strickland cautions:

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

466 U.S. at 690.

Applying these standards here, it is impossible to place Klein's performance within the wide latitude of deference given to tactical decisions as set forth by Strickland. Klein simply stated (again through suggestive questioning at the evidentiary hearing) that he "would not have" wanted this type of evidence to come before the jury. But he never saw the report on the "snakes in brown uniforms" (since he never obtained all of Van Poyck's records). Thus, it was simply impossible for Klein, at the time of the penalty phase, to have "chosen" not to pursue Van Poyck's history of mental illness because he feared it would "open the door" to the introduction of that letter. Likewise, Klein never obtained Van Poyck's medical and/or psychiatric records and thus nothing "unfavorable" contained in them could possibly have played any part in any "decision" or "choice" Klein might have made.

The rule — for both sides — should be that counsel's conduct

in an IAC claim is to be judged not by what counsel could have concluded had a reasonable investigation been made but by what counsel actually did. Here, Klein "decided" to do nothing. The reasonableness of that decision is all that is — or should be — at issue.

ARGUMENT III

COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE IN A CAPITAL PENALTY PHASE IS NOT "REASONABLE" WHEN BASED ON THE THEORY THAT TO DO SO MAY HAVE "OPENED THE DOOR" TO UNFAVORABLE EVIDENCE THAT WAS CLEARLY NOT ADMISSIBLE.

The majority's focus on the negative information in Van Poyck's prison file also undercuts Strickland's requirement that any decision be "reasonable." The "unfavorable" evidence was not admissible into evidence, and thus Klein would not have "opened" any "door" by introducing other mitigation, such as Van Poyck's history of mental illness, even if he made a "strategic choice" not to pursue it. The question presented is thus whether counsel's decision not to introduce evidence can ever be "reasonable" when based on an erroneous view of the law.

Section 90.404(1) and 90.404(2)(a), Florida statutes [Florida's Evidence Code] prohibits the introduction of evidence of bad character or traits (subsection 1) or of "other crimes, wrongs or acts" (subsection 2 (a)). Moreover, a long line of case law in capital cases from the Supreme Court of Florida bars introduction of such evidence in a penalty phase. The only evidence which is admissible by the State is that which goes towards establishing the existence of the statutory aggravating circumstances. None of this allegedly "unfavorable" evidence was in any manner relevant to any statutory aggravating circumstance. See, e.g., Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) (evidence of Hitchcock's pedophilia irrelevant at capital sentencing; new sentencing hearing ordered). The Hitchcock Court reaffirmed the long established rule (predating Van Poyck's trial) that:

> We have held that, to be admissible in the penalty phase, the State's direct evidence must relate to any of the aggravating circumstances. Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

Hitchcock, 673 So. 2d at 861.

Significantly, in Hitchcock, the state elicited the inadmissible testimony and evidence on redirect after claiming that the defense counsel had "opened the door" to its admission. The Hitchcock court again reiterated that, in a penalty phase proceeding the State is not permitted to present irrelevant, inadmissible evidence of a defendant's character, or his criminal history, "which constitutes inadmissible nonstatutory aggravation, under the pretense that it is being admitted for some other purpose." Id. at 861. The Hitchcock court cited and quoted the following from its prior decision in Geralds v. State, 601 So. 2d 1157 (Fla. 1992):

> This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Hitchcock, 673 So. 2d at 862, quoting Geralds, 601 So. 2d at 1163. Accord Jackson v. State, 451 So. 2d 458 (Fla. 1984) (murder convictions reversed where State's witness testified of defendant's alleged boast that he was a "thoroughbred killer from Detroit" because "the boast neither proved that fact, nor was that fact relevant to the case sub judice."); Dibble v. State, 347 So. 2d 1096 (Fla. Dist. Ct. App. 1977) (new trial required in robbery case when state witness made statement which implied that the defendant might have committed other robberies).

Because there was no theory under which the allegedly "unfavorable" evidence would have been admissible in Van Poyck's penalty phase (and neither the courts below nor the State ever

offered any theory of how it would have been admissible), it follows that counsel's alleged "decision" not to pursue mitigation because it might "open the door" was not a reasonable decision, as required by Strickland. The rule should be that any "strategic choice" not to present evidence because of a fear of "opening the door" must be based on a correct view of the law. Here, any such "strategic choice" — to the extent it was made — was not so based. Accordingly, the Supreme Court of Florida's decision should be reversed.

CONCLUSION

WHEREFORE, having demonstrated that the Supreme Court of Florida has misconstrued and misapplied various aspects of Strickland, supra, and that Van Poyck's sentence of death is in violation of the Sixth Amendment to the U.S. Constitution, petitioner prays that this Court will accept jurisdiction over this matter and review the decision below.

Respectfully submitted,

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APPENDIX

Van Poyck v. State, 694 So. 2d 686 (Fla. 1997)	A1-A30
Order Denying Petitioner's Post-Conviction Relief	B1-B12
Order Denying Rehearing	C1

APPENDIX A

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

vs.

No. 84,324

STATE OF FLORIDA,
Appellee.

[March 27, 1997]

PER CURIAM.

William Van Poyck appeals an order entered pursuant to Florida Rule of Criminal Procedure 3.850, in which the trial court denied all relief. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed, we affirm the denial of Van Poyck's motion for postconviction relief.

Facts

The facts of this case are detailed in our decision, reported in Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), affirming Van Poyck's convictions and sentences. In summary, the relevant events unfolded as follows. On June 24, 1987, state inmate James O'Brien was transported to the office of a dermatologist by two corrections officers. Officer Griffis drove the van and was unarmed. Officer Turner was responsible for watching O'Brien, the two separated by a cage. Upon arriving at the dermatologist's office, Officer Turner turned his eyes downward looking for paperwork. When Turner looked back up, he saw Van Poyck, who had approached the van, aiming a gun at his head. Officer Turner was forced out of the van and ordered to crawl underneath the vehicle. While Officer Turner was getting under the van, Frank Valdez, one of Van Poyck's accomplices, was approaching the driver's side of the van. Officer Turner, from underneath the van, saw Officer Griffis forced out of the van and taken to the back of the vehicle.

Then, while noticing two sets of feet near the back of the van, he heard the gunshots that killed Officer Griffis. Officer Turner did say, however, that he was unable to testify as to Van Poyck's location when the shooting occurred. Officer Griffis was shot three times, once with the barrel of the gun placed to his head.

Van Poyck was tried and convicted for first-degree murder, attempted first-degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter. By a vote of eleven to one, the jury recommended that the penalty of death be imposed. The trial judge followed the jury's recommendation and sentenced Van Poyck to death. On direct appeal, Van Poyck raised six guilt-phase issues and fifteen penalty-phase issues. This Court, in our initial opinion, found the evidence could not sustain the conviction of premeditated murder but upheld the first-degree murder conviction on the theory of felony murder. After that pronouncement, we rejected or found harmless all other claims and affirmed Van Poyck's convictions and sentences.

Van Poyck then filed a motion to vacate his convictions and death sentence, pursuant to rule 3.850, on December 8, 1992. a substantial evidentiary hearing was held on multiple issues after which the lower court denied all relief.

In his appeal of that order, Van Poyck raises sixteen claims. We find that none warrant relief. Accordingly, we affirm the lower court's order.

Ineffective Assistance of Penalty-Phase Counsel

Van Poyck's first two claims center around the representation he received at the penalty-phase proceeding. He argues that his counsel was ineffective. We disagree. Further, he asserts that the lower court inappropriately limited his ability to prove the ineffective nature of his penalty-phase representation by refusing to reopen the evidentiary hearing or to supplement the record when an affidavit became available after the close of the proceedings. We also find no merit in this assertion.

Van Poyck's claim of ineffective penalty-phase representation is based on the allegation that his trial counsel, Cary Klein, failed to adequately investigate mitigating evidence of Van Poyck's prob-

lematic life and mental-health histories. The two-prong standard for evaluating an ineffective assistance of counsel claim, set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), requires: (1) that the defendant first demonstrate deficient performance by counsel; and (2) that the defendant then demonstrate that such deficient performance caused prejudice. Based on the record in this case, Van Poyck has not demonstrated deficient performance by his counsel.

At the outset, it must be understood that Van Poyck argues two distinct areas of deficiency. He argues that Klein should have investigated, discovered, and presented both his life history and his mental-health history. As to his claim regarding deficient investigation and presentation of mental-health evidence, we find that Klein had clear tactical reasons for avoiding such a line of argument. The following testimony from Klein at the evidentiary hearing below illuminates Klein's tactical considerations:

Q [By prosecutor Geesey]: During the course of your representation of this defendant, you've indicated that you obtained his jail records. Were you referring to Department of Corrections records?

A: Yes.

Q: When did you obtain those records and --

A: I don't recall exactly the date. It was fairly early on in the representation. I would say sometime by late fall we had gotten his DOC records or sometime by the winter.

Q: Why did you want his DOC records?

A: We sent away for his Department of Correction records because he had spent the last 15 or so years in the Department of Corrections. From the time he was 17 or so until maybe 6 months before the crime happened, that's where all of his time was spent. The Department of Corrections also had all of his mental health records from the time he was in DOC so we would need those, also.

One of the things we were looking for, and this was a suggestion of Mr. Van Poyck's, if he had a decent prison record or there

were some people willing to testify that he could be a model prisoner, that might be a mitigating circumstance, a jury believing that he could be a model prisoner in the prison system might be willing to let him spend the rest of his life in the prison system so we sent away for those prison records.

The prison records also had his prior crimes, prior convictions, some of the judgments in them. It would have a lot of things we would need to help us prepare primarily for phase two but even, to some degree,for phase one. If we decided to have him testify, we'd need to know what convictions he had. That would be in Department of Corrections records.

Q: Obviously well may have.

Have you reviewed your time sheets and your billing from back in '87 and '88 recently?

A: No. I haven't, not since I submitted the bill on the case which was probably 4 to 6 months after the trial was over.

Q: Did you have any recollection of approximately how many hours you spent reviewing those DOC records?

A: I could only estimate. It had to take at least 10 hours. It took the better part of two complete days to get through most of the records and that's even with skimming some of them.

Q: And in those records, you were looking for what type of evidence, specifically?

A: I was looking for, specifically, mental health records. I wanted to see what happened in the mid '70's, why he was -- why he was sent to Chattahootchee, what the diagnosis was, the prognosis, why he came back.

I was looking also, very specifically, for whether I could get anything out of his prison records that would be mitigating in terms of him being a model prisoner, a good prisoner. Specifically, that is really the two specific things we were looking for.

Q: First of all, did you find anything in those records that would

give you evidence that he was a model prisoner and that you could perhaps use as a non statutory mitigating circumstance?

A: No, I didn't find anything that was really helpful in that regard.

Q: And, in fact, was it fairly—how would you describe the number of disciplinary reports and the type of offenses he committed for those?

A: Well, he had several D.R.'s. He had quite a number of them. Obviously, he had done a lot of fighting in prison.

Q: Were there any weapon offenses for the D.R.'s?

A: I think there were one or two weapon offenses. He had had some escapes, also.

Q: Did you see anything in those records that you could use to establish a nonstatutory mitigating circumstance?

A: At one point I thought that I could take at least the 5 years of his prison record and use some of that because it got progressively better as he was there. The first 10 years or so he was in prison, it was horrible. As I guess he learned how to play the system, it got better but even in the last 5 years, I think he got one or two D.R.'s. I didn't think we could use any of that without having the previous 10 years come in from the State to make it look even worse than it was.

Q: You felt that it couldn't be done without opening the door?

A:Right.

Q: From your review of those records, did you believe that there was anything in there that would be of assistance in a penalty phase?

A: I thought the fact that he had been in Chattahootchee and the previous mental health encounters would be of some mitigating or might be of some mitigating use in phase two.

Q: At some point in time was there a decision made not to use that evidence?

A: Yes.

Q: When was that decision made?

A: Well, initially, the decision was made. Although it wasn't hard and fast, I was inclined not to use them. When I spoke to Mr. Van Poyck he explained to me that he had faxed some of the brief mental illness. He faked the light bulb incident and we had a good laugh over that. And I probably would have used it notwithstanding, if I had gotten some help later on from some mental health experts that perhaps he was, notwithstanding what he told me, he was still mentally ill.

Q: When did the defendant tell you that he had faked some of his mental health history and faked the incident with the light bulb?

A: Well, I'm trying to remember the first time it came up. I think the first time it came up I'm not sure Mike [co-counsel Dubiner] was even appointed. Actually, I think he was appointed, which meant it was probably the summer of '88. It was probably either late spring or summer of '88.

After Mike Dubiner was appointed, we had a conversation in the jail. He had told me that he denied that he was really sick in the '70's and he told me he had like made it all up to get out of the prison population to go to Chattahoochee.

Q: When the defendant told you this, did you question in your own mind whether or not he was being truthful with you?

A: Initially, no, I don't think I really questioned it. I think I accepted what he was telling me. He went into detail. I mean, he wasn't delusional, at the time. He had a pretty good recall of most of the facts and fairly decent sense of humor about the incident. He understood the circumstances, at the present time. What I did have is doubts, not about his truthfulness but I had doubts about why he was telling me that.

Q: Were you concerned about that?

A: Yes, I was pretty —

Q: Let's go specifically into what the defendant told you in the summer of '88 about his faking.

First of all, did the defendant say anything about any preparation before he began faking this mental illness?

A: He told me that he had gone to the prison library and looked up some books on schizophrenia and mental illness, had done extensive reading on it in preparation for this charade.

Q: How long did he tell you that he had spent preparing and reading and studying for all of this?

A: He didn't tell me how long. I don't recall if he told me specifically how long but I got the impression he was fairly well -- if he was telling me the truth, that he had prepared pretty well for it because he fooled the doctors, obviously, at Chattahoochee at Florida State Hospital.

Q: Did the defendant say how he was able to obtain these materials, read and study these materials? Did that seem consistent with his cognitive ability that he demonstrated to you in his legal research?

A: It did. It was probably one of the reasons I probably believed him without much doubt, yes.

Q: And what did he say, specifically, about how he faked the mental history?

A: I think he explained to me how he made it appear that he was chewing on this light bulb.

Q: What did the defendant say about that?

A: I think he said he put something in his mouth that made a crunch or something like that and they were convinced he was eating a light bulb.

Q: Did he have light bulb parts?

A: Yes, he was like spitting out the little metal pieces. He didn't go into great detail about it but it was enough to convince me that he had pulled a little sleight on hand on them.

. . .

Q: Did you want to open the door to any evidence of the defendant's escape or attempted escape while incarcerated on other charges earlier in his life?

A: No.

Q: Did you think that would have a detrimental effect in seeking a life recommendation from the jury?

A: Clearly that would've had a detrimental effect. We did not want the jury to know this was not a person who could be trusted for life in prison.

Q: Earlier on defense counsel showed you State's Exhibit Number 2 and that it was a report of the defendant in 1977 stating that he had expected to end up on death row someday and he would not hesitate to destroy a snake in a brown shirt. Is that information that you would have wanted to come in front of a jury in a penalty phase?

A: No, I don't think so.

Q: Would you want to do anything to call attention to that document on the part of the prosecutor?

A: No.

Q: Also, in cross examination, the defense counsel asked you about the five years aggravation in the defendant's parole in 1980 because of his mental health history. That took place in 1980; correct?

A: Yes, and it was litigated for a number of years thereafter.

Q: After that occurred in 1980, was there any additional evidence of mental disturbance on the part of the defendant?

A: No.

Q: He was cured from that point on?

A: As far as I know he was mentally healthy for the remainder of the 80's.

Q: Concerning the issue of voluntary intoxication, was that successful for the codefendant?

A: No.

Q: Did you think it was a viable defense for your client?

A: No.

(Emphasis added.) This extended excerpt demonstrates that Klein had quite adequate reasons for limiting his use of the prison records and thereby limiting the presentation of Van Poyck's mental-health history. Further, Klein testified that Dr. Villalobos, after examining Van Poyck prior to the penalty phase, reported that Van Poyck was a sociopath. Indeed, Klein testified that Dr. Villalobos asked not to be called as a witness because his findings would not be helpful. This information only strengthens Klein's tactical choice. While we acknowledge that Klein's co-counsel Dubiner testified that they were unprepared for the penalty-phase proceeding and, in his opinion, should have spent more time preparing mental-health evidence for presentation, we will not second-guess Klein's clearly tactical choice. See Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding that present counsel's disagreements as to strategy does not necessarily satisfy Strickland because standard is not how present counsel would have, in hindsight, proceeded).

As to Klein's choices regarding the presentation of Van Poyck's life history during the penalty-phase proceeding, we likewise find no error. Evidence of Van Poyck's life history was adequately presented by Klein at the penalty-phase proceeding.[1] Indeed, the jury was actually aware of most aspect of Van Poyck's life that he now argues should have been presented. Klein testified to the following in the evidentiary hearing below:

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[1]It must be noted that Van Poyck blurs the line between his life history and his mental-health history in this portion of his brief. To the extent that he reargues that Klein was deficient for failing to adequately investigate and present Van Poyck's mental-health history, we ignore such argument as it has been resolved above.

Q: Did you ask the defendant any questions to try and find out what you could do in a penalty phase?

A: We discussed it constantly, constantly. He was very up on it.

Q: What kind of questions?

A: I asked him who I could contact, who I could call, who were your friends when you were kids? I didn't have any. Tell me about your family. Well, the only one still in contact is my stepmother and my brother, so on an so forth. I don't mean to tell you that he was directing what to do but he had a tremendous input, being intelligent and knowing the mitigating circumstances, both statutory and nonstatutory. We considered like a list of 18 — I think it was 15, 16, 18 nonstatutory mitigating circumstances.

In fact, I put them up in closing argument in phase two. I must have listed 12 or 13 nonstatutory [circumstances] that we could not actually prove other than the couple that we tried to prove that I suspected were there but none could we show.

Q: Did you ask the defendant if he had ever been raped?

A: We talked about that. He told me that he had not. He didn't have that many problems in jail; that he was able to take care of himself and they generally left him alone.

At the penalty-phase proceeding, defense testimony was presented by Deborah Chisholm, Jeffrey Van Poyck, Anne Van Poyck, Lee Van Poyck, and by Van Poyck himself. Chisholm was a nurse a the Palm Beach County Jail when she met Van Poyck. She testified that Van Poyck was a "very caring person, very friendly, very loving and very intelligent and somebody that I really enjoyed talking to." Further, she testified that Van Poyck had indicated to her that he did not kill Griffis and the he was sorry that the shooting had happened.

Jeffrey Van Poyck is Van Poyck's brother. Klein testified that he made the tactical decision to call Jeffrey Van Poyck for the following reason:

> One of the reasons why I called Jeff, I wanted Jeff to testify before the jury because I wanted these people to see that this was his only role model from the time he was a little baby. Jeff, who was his brother, I think was serving, at the time, I think a 40 year prison sentence for armed robbery.
>
> You had to be there to listen to this guy's testimony. I think he was the most cold and chilling witness I had ever seen on the witness stand. As it turned out, I think the jury hated this guy, couldn't stand him. But I felt like we had to call him because if I had tried to explain to [the] jury what kind of role model or influence he was, they wouldn't have believed me. I though they had to see Jeff for themselves to understand how chilling, cold an influence this person would've had on Bill. But again, we had no psychological underpinning for it.

Jeffrey Van Poyck testified to the facts surrounding his mother's death. The defendant was very young when his mother passed away. Jeffrey Van Poyck then testified that his father hired Ms. Dano to take care of both the house and the children (Jeffrey, William, and Lisa). She was a strict disciplinarian. Indeed, she beat the three children until their father fired her at gunpoint. At that point, Jeffrey Van Poyck testified, Aunt Phyllis moved into the house and cared for the three children. She remained as caretaker until the elder Van Poyck (their father) married Lee Hightower. Finally, Jeffrey Van Poyck extensively testified to his life in crime (500 burglaries, he claimed, prior to his first arrest) and the influence such an example could have had on the defendant.

Anne Van Poyck was the defendant's aunt. She gave insight into Aunt Phyllis. First, she testified that Phyllis may not have been the woman's real name. Second, she testified that the children's natural mother was named Phyllis. Third, she revealed that Aunt Phyllis told the children that she was their real mother. Finally, her testimony was that she was not impressed with Aunt Phyllis's ability as a surrogate mother and that she considered Aunt Phyllis to be an unstable person.

Lee Hightower Van Poyck is the defendant's stepmother. Her

testimony provided insight into the personality of the defendant's father, Walter Van Poyck. She stated:

> Well, first of all, he was a very good man. He was a very kind man, a very caring man.
>
> As you probably know, he was disabled. He lost his leg in World War II in the Holland invasion.
>
> Consequently, he was not with the children as active as an ordinary father would be. He was unable to do certain things with the children, but he was a good father.
>
> . . .
>
> Let me say this: Walt Van Poyck loved his family. He has difficulty demonstrating that love. He was not demonstrative but he was kind and he was gentle and he was caring, but he wasn't outgoing with his affection.

Lee Hightower Van Poyck also verified that Aunt Phyllis had grown up being called Amy but changed her name to Phyllis at some point. She also thought that Aunt Phyllis was unstable. Finally, she opined that Jeffrey Van Poyck had been a bad influence on the defendant.

Notably, defendant Van Poyck then testified to the following:

Q: Mr. Van Poyck, you heard your mother testify today and you heard your brother testify about some remorse that you showed in writing some letters. If you would forget for a second whatever letters you may have written, Mr. Van Poyck, how do you feel about the — about your actions regarding the incident of June 24, 1987?

A: Well, I take responsibility for the fact that — if I had not made a decision to free James O'Brien, Mr. Griffis would still be alive.

Q: Mr. Van Poyck, you heard testimony about your brother, Jeffrey, and his influence on you. You heard Jeffrey testify. Is it Jeffrey's fault that you are the way you are today?

A: I can't say that, no, sir.

Q: Why not?

A: I happen to believe that people should be responsible for their own actions.

Q: Do you consider yourself a fairly intelligent person?

A: I would hope so.

(Emphasis added.) Clearly, Klein did an adequate job of presenting Van Poyck's life history. In sum, we conclude that Klein's performance was not deficient in presenting Van Poyck's mental-health and life histories. Indeed, Klein tactically avoided presenting (or opening the door to the presentation of) events severely disadvantageous to Van Poyck's cause. Accordingly, we find no merit to the claim that Van Poyck received ineffective assistance of counsel at the penalty phase of his trial.[2]

Van Poyck's second argument relating to his penalty-phase representation is that the court below erred in refusing to allow him to either supplement the record or to reopen the evidentiary hearing on the post-conviction motion. The purpose of such reopening or supplementation would be to secure the affidavit or testimony of Dr. Villalobos in relation to his conversations with Klein. Dr. Villalobos presumably denies making certain statements to Klein. As noted earlier, Klein testified that Dr. Villalobos told him that Van Poyck was a sociopath. Indeed, the lower court cited this fact to bolster its conclusion that Klein's decision were part of a tactical plan. It now seems that Dr. Villalobos, if allowed, would deny making such a statement.

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[2]We note that Van Poyck raised this same claim in his direct appeal. At that time we disposed of the issue by stating that "[a]fter fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding." Van Poyck v. State, 564 So. 2d 1066, 1070 (Fla. 1990). The State, however, argued in its direct-appeal brief that "[a]ppellee contends that the issue is improperly before this Court on direct appeal." As is proper, the State does not argue that the claim is procedurally barred in this collateral action. We choose to address this claim on its merits. For the reasons explained, though, we find that it has no merit.

In evaluating the impact of the judge's action, we must look at the type of claim Van Poyck raises. The trial judge's denial of Van Poyck's motion to reopen or to supplement is only harmful to him if the refused material would be determinative of a valid claim. In this case, Van Poyck is trying to use Dr. Villalobos's testimony or affidavit to prove ineffective assistance of penalty-phase counsel. If such ineffective assistance of counsel could not be proven even with the additional testimony or affidavit, any error in refusing to reopen or supplement would be harmless.

We have already stated that the record, as currently comprised, demonstrates no penalty-phase deficiency by Klein. Would the testimony or affidavit of Dr. Villalobos change that? Two large assumptions would have to be made in order to contemplate such a change. First, it would have to be assumed that Dr. Villalobos's testimony or affidavit would be given more credibility and weight that Klein's testimony. Second, it would have to be assumed that Klein's tactical decision as to mental-health evidence is crippled if he truly received no information from Dr. Villalobos (as the doctor claims) instead of negative information (as Klein claims). It is not at all clear that either of these assumptions is valid. In the first instance, Klein's testimony is quite convincing. Indeed, there is scant evidence that Klein's testimony even came as a surprise to Van Poyck. In the second instance, it must be remembered that Klein testified that he was inclined to refrain from presenting mental-health evidence as mitigation unless a mental-health expert could actually say Van Poyck was mentally ill. Dr. Villalobos was not, by any account, prepared to make that statement. In fact, the affidavit signed by Dr. Villalobos (at issue in this particular motion) made no such affirmative claim. The affidavit reflects only that Dr. Villalobos had insufficient time to make any evaluation. Van Poyck attributes the insufficiency of examination time to Klein's deficient preparation. Even if Dr. Villalobos told Klein that he had insufficient time to offer any opinion, it is by no means certain that Klein would have been deficient for making the tactical decision to refrain from presenting (thereby halting his search for a mental-health expert) mental-health mitigation. As we have already demonstrated, Van Poyck's prison records were full of unsavory information that Klein has testified he wanted to keep from the jury.

With this said, though, we will grant, arguendo, that both assumptions outlined above are valid and that Dr. Villalobos's affidavit or testimony would prove Klein's penalty-phase performance deficient. In such an event, Van Poyck still has to demonstrate that he was prejudiced. He cannot do so because this record will not support such a conclusion.

Any mental-health evidence that might have been produced would have been severely undermined by the contents of Van Poyck's prison records. Those records included extensive documentation as to examinations and conclusions by prison doctors. On September 26, 1975, Van Poyck was presented to the Forensic Unit Staff Conference. The conference was attended by doctors Ogburn, Dachtera, and Mehta. Their final diagnosis was that Van Poyck suffered from "Personality Disorder, Antisocial Type with Paranoid Features." Then, on November 20, 1975, Dr. Margarita Gonzalez examined Van Poyck. She diagnosed Van Poyck with: (1) personality disorder, antisocial type with paranoid features; and (2) drug abuse, multiple. On February 26, 1976, Dr. Delfina Johnson examined Van Poyck and found no psychosis at the time. Once again, on May 27, 1983, Dr. Sotomayor evaluated Van Poyck and concluded that he did not "reveal any signs of psychosis." In fact, Van Poyck told Dr. Sotomayor that "[a]'int nothing wrong with me now. Am working and trying hard to behave myself." The following year, on June 6, 1984, another report was filed which found that "[s]ince Van Poyck exhibits an absence of any acute distress or mental disorder, treatment is not indicated and none is recommended." The prison records clearly contain an abundance of medical evidence indicating that Van Poyck's mental condition, if any, would not be mitigating in nature. Any testimony developed by the defense through mental-health experts would certainly be tempered by its inconsistency with the medical reports in the prison records. The records also contain the following information that would certainly be damaging to Van Poyck.

Over twenty prison disciplinary reports were filed against Van Poyck. Further, he had an attempted escape in his records. On that point, Klein specifically testified that he wanted to keep such information from the jury because of the negative impact it would have on seeking a life recommendation. The records also reflect that in

March of 1977, Van Poyck was placed in administrative confinement after getting caught typing a letter to another inmate. In that letter he stated, "I know for a fact that I am going to end up on death row within a couple of years." He also stated, "I would not hesitate to destroy any snake in a brown uniform." It must also be remembered that Van Poyck admitted to Klein that he faked the light bulb incident. If Klein had proceeded to use the incident as mitigating in nature, he would have been faced with an ethical problem. He would have encountered a situation in which his duty of candor towards the court required the revelation of Van Poyck's admission. The problematic nature of such a predicament is obvious.

Even as we assume, arguendo, that Klein should have allowed more time to mental-health evaluations of Van Poyck by experts, it cannot be denied that the force of the above information would probably dwarf any expert testimony Klein might have secured. In the context of this case, there is no possibility that Van Poyck could demonstrate that "but for counsel's errors he would have probably received a life sentence." Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). In reaching this conclusion, we have taken into account the testimony offered by Dr. Robert T. M. Phillips. Dr. Phillips specifically opined that Van Poyck

> is an individual who has suffered from what we would describe as a psychoactive substance abuse, organic mental disorder, which is a long winded, perhaps unnecessary saying, this is someone who has suffered from the ravages of alcohol and drug dependency and at the height of their dependency is most dysfunctional.

Dr. Phillips also opined that Van Poyck suffered from a schizoaffective disorder, a disorder described as being "not quite schizophrenia." We restate that, when considered in the context of the entire record, an isolated advantageous evaluation cannot be considered determinative.

In light of our finding that Van Poyck cannot demonstrate prejudice, the supplementation of the record or the reopening of the evidentiary hearing would not have led to a finding of ineffective assistance of penalty-phase counsel. An error, if any, in refusing to

reopen or to supplement is consequently harmless beyond a reasonable doubt.

Ineffective Assistance of Guilt-Phase Counsel

We next address Van Poyck's claim that he was denied effective assistance of counsel at the guilt phase of his trial. Specifically, Van Poyck claims that his guilt-phase representation was ineffective in the following ten ways: (1) by failing to demonstrate that Van Poyck was not the triggerman; (2) by failing to impeach the testimony of Office Turner; (3) by failing to present a voluntary intoxication defense; (4) by failing to pursue a motion to change venue; (5) by failing to adequately conduct voir dire; (6) by conceding the underlying felonies of robbery and escape; (7) by failing to preserve a Batson[3] violation; (8) by allowing a shift in the burden of proof; (9) by allowing Van Poyck to take a large role in trial preparations; and (10) by failing to object to prejudicial statements by the prosecutor. More generally, Van Poyck also complains that the court below erred in summarily denying certain claims, thereby denying him a full and fair hearing. We disagree. We affirm the trial court's denial of all relief on this issue. Prior to addressing any of the individual areas of concern as to guilt-phase representation, however, we point out the following insightful testimony offered by Van Poyck's trial co-counsel (Michael Dubiner, now a key Van Poyck witness) at the evidentiary hearing below:

Q: You testified on direct that this was a loser in guilt phase. Is that still your opinion today?

A[Dubiner]: No question about it.

Q: There were numerous witnesses who identified the defendant as being involved in the escape attempt, isn't that correct?

A: Yes.

Q: The murder weapon was found in the vehicle where the defendant was eventually arrested with Valdez, correct?

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[3]Batson v. Kentucky, 476 U.S. 79 (1986).

A: That's correct.

Q: Officer Turner's weapon that was taken from him during the commission of this crime was found in that motor vehicle, correct?

A: That's correct.

Q: There's never an identity issue as to whether the defendant was involved in that escape attempt, identity was never in issue?

A: No.

Q: Would anything have changed the outcome of that guilt phase?

A: No. I think that the strong likelihood is that any defense that was presented in Phase I would have led to a first-degree murder conviction.

Surely this testimony from a defense witness militates towards a finding that Van Poyck could not have suffered prejudice under the second prong of Strickland. Dubiner's testimony is reinforced by the statements, on cross-examination, of another defense witness (at the evidentiary hearing below), Carol Haughwout. She stated:

Q: My question is very specifically to the guilt phase of that trial, is there a viable defense?

A: No, I don't believe that there is a defense that would have resulted in an acquittal, no.

Q: There is no voluntary intoxication defense?

A: Not that would have resulted in an acquittal, no.

Q: There is no insanity defense for the guilt phase?

A: Not that would have resulted in an acquittal.

Q: There's no defense of any kind to the guilt phase?

A: That's — I think that's what I said before, yes.

Our review of the record confirms the opinions expressed by both Dubiner and Haughwout. Even if trial counsel were, arguendo, deficient at the guilt phase, Van Poyck was not prejudiced by any of those mistakes. We stress, however, that we find few deficiencies. For instance, Klein clearly had tactical reasons for limiting his presentation of evidence that might indicate a triggerman other than Van Poyck. Klein testified at the evidentiary hearing below that he did not want to give up his "sandwich." In other words, he did not want to lose the opportunity of giving two closing arguments at the guilt phase. To that end, he stated the following:

Q: Was there — when you talked about the fact that it was important to save the sandwich, you're talking about the ability for the defense to argue first and last if there's no evidence offered aside from the testimony of the defendant?

A: Yes.

Q: Was that significantly important to you, sir?

A: It was. It was very important to both Mr. Dubiner and myself.

Q: Do you place an importance of argument over evidence?

A: Generally, no, I don't. But I thought in this case it was very important to have the opening salvo and the closing salvo.

Q: Was argument an important portion of Mr. Van Poyck's capital case for the defense?

A: Yes.

Q: How important?

A: Argument?

Q: Yes.

A: Since we didn't have any exculpatory evidence, I would say it was crucial.

We find it clear that Klein had sufficient tactical reasons for refraining from the presentation of further direct evidence (in the form of DNA tests and receipts from a gun shop) as to the trigger-man's identity.

Van Poyck also alleges that Klein was deficient in his cross-examination of Officer Turner, the guard who survived the incident. As to that cross examination, Klein testified at the evidentiary hearing as follows:

Q: Before going into that cross-examination, had you made some decision about how you were going to approach Mr. Turner?

A: I had many, many months to think about it, yes. I made a decision we were--that I was not going to flat out attack him but be somewhat sensitive in cross-examining Mr. Turner because I though he would be very sympathetic to the jury.

Q: And it was a tactical decision, I take it, that you're describing?

A: Yes, I suppose you could put it that way. It was tactical. Him being the surviving guard in the incident, I thought the jury would have tremendous sympathy for him and I think probably would look askance on anybody directly attacking this guy. He was lucky to be alive, after all.

Despite these practical considerations, Klein still conducted a thorough cross-examination. His performance in this area was not deficient.

Next, Van Poyck argues that Klein was deficient in failing to investigate a voluntary intoxication defense. The record refutes any suggestion that Van Poyck was intoxicated at the time of the offense. Indeed, Van Poyck himself told Klein that he was sober. Further, Klein independently investigated the possibility that there was cocaine in the car used. He found no evidence of such substance. Klein was not deficient for rejecting this theory of defense.

In sum, Van Poyck was not denied effective assistance of counsel at the guilt phase. We can find few, if any, deficiencies in Klein's performance. More important, however, is that fact that Van Poyck can demonstrate no prejudice. Van Poyck has the heavy

burden of demonstrating that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Our review of the record demonstrates that the result in the guilt phase of this case is certainly reliable. This is reinforced by the testimony, at the evidentiary hearing below, of two of Van Poyck's own witnesses. We affirm the holding of the court below on this issue.

Brady Claim

As his fifth[4] issue, Van Poyck claims that a note in the state attorney's file was withheld from him during discovery. He further claims that the note was both material and exculpatory. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The note at issue is not evidence. Instead, it is work-product. Even if it were evidence, though, it would not be material. In United States v. Bagley, 473 U.S. 667, 682, (1985)(Blackmun, J., plurality opinion), id. at 685 (White, J., concurring in part and concurring in judgment), the United States Supreme Court forwarded the following formulation for determining materiality: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Applying such a materiality standard to the facts of this case, there is clearly no reasonable probability that the result would have been altered had the challenged note been disclosed. The contents of the challenged note indicated that the "wound [came] from the driver's side." This presumptively militated against a finding that Van Poyck was the triggerman. It would certainly have no effect on Van Poyck's conviction for

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[4]Van Poyck's fourth issue concerning the great risk to many aggravating circumstance is procedurally barred and will, consequently, be addressed with other procedurally barred issues after we finish rejecting the claims that merit substantive review.

felony murder. Therefore, the court below properly rejected this claim. We affirm the denial of relief.

Remainder of Van Poyck's Claims

The remainder of Van Poyck's claims are as follows: (4) the great risk to many aggravating circumstance was unconstitutionally vague; (6) the judge and jury weighed the invalid aggravating factors that the murder was premeditated or that Van Poyck was the triggerman; (7) the prosecutorial argument as well as the jury instructions improperly shifted the burden of proof during the penalty phase proceedings; (8) the trial court improperly denied Van Poyck's challenges for cause during jury selection; (9) Van Poyck's constitutional rights were violated by the prosecutor's conduct during trial; (10) the acquittal and affidavit of O'Brien together with the testimony of Turner necessitate a new trial; (11) Enmund/Tison[5] errors necessitate a reversal of Van Poyck's death sentence; (12) the consideration, as an aggravating circumstance, of the underlying felony that had already been utilized to convict Van Poyck of felony murder was improper; (13) the trial court and prosecutor erred in indicating to the jury that sympathy was an inappropriate consideration; (14) the trial court failed to conduct an independent evaluation of the mitigation offered by Van Poyck; (15) the jury instructions given at the penalty phase were vague and confusing; and (16) the trial court committed fundamental error by failing to instruct the jury on justifiable or excusable homicide as part of the instruction on manslaughter.

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[5] Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).

All of these claims are procedurally barred. Most were raised and rejected on direct appeal.[6] One of these claims was not objected to at trial and fails to rise to the level of fundamental error.[7] Finally, two of the claims are waived because they should have been raised on direct appeal.[8]

For the reasons expressed, we affirm the lower court's denial of all relief.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J. and SHAW, J., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ANSTEAD, J., concurring in part and dissenting in part.

I dissent from that part of the opinion finding no error in the trial court's failure to consider the evidence of Dr. Villalobos, and in the majority's approval of the trial court's finding that trial counsel performed competently in investigating and preparing appellant's case for the penalty phase proceedings. This Court was faced

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[6]Claims that were raised and resolved on direct appeal include (4), (6), (8), 10) (this material does not qualify as newly discovered evidence and the challenges to the convictions for attempted escape and premeditated murder were resolved in the direct appeal), (11), (12), (14), and (15). As to claim (4), we specifically stated in the direct appeal that "[w]e find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established in this record and that the trial judge could properly conclude that the aggravating circumstances outweighed the mitigating evidence in this cause." Van Poyck, 564 So. 2d at 1071. No subsequent change in the law is relevant to this analysis and therefore the procedural bar remains in place.

[7]Claim (9) is barred due to a lack of a contemporaneous objection at trial. Any error would not be fundamental.

[8]Claims (7) and (13) should have been raised on direct appeal.

with almost the identical circumstances in Deaton v. Dugger, 635 So. 2d 4, 9 (Fla. 1993), wherein we held that counsel who waited until after the guilt phase to prepare for the penalty phase and then "scrambled" to investigate and prepare mitigation "deprived [the defendant] of a reliable penalty phase proceeding." The same holding is mandated here.

The trial court ignored the issue of the failure to investigate and, instead, focused entirely on the apparently misrepresented statements of Dr. Villalobos, and the trial court's speculation that appellant's bad record would have resulted in a death recommendation regardless of any mitigation. Similarly, the majority here has ignored the undisputed evidence of lack of investigation and preparation, as well as this Court's own prior opinion which demonstrates counsel's utter failure to present any viable mitigating evidence to the trial judge and jury. See Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). The majority fails to acknowledge, for example, that even the meager mitigation evidence presented by counsel was not put together until after the penalty phase began, and even then counsel conceded he had to "scramble" to put anything on.[9] Further, the attempt at mitigation by this "scramble" actually backfired when the trial court not only rejected it, but used it to bolster the case against the defendant. See 564 So. 2d at 1069.

The majority has simply rehashed a lot of general information known to trial counsel in an attempt to put the best face on a very bad situation. Tellingly, the majority has devoted some ten pages

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[9]This "scramble" included the ill-fated attempt to use Dr. Villalobos, who, without time to do and review testing and secure background materials on the defendant, refused to get involved.

to a vain attempt to support a flawed analysis of less than two pages issued by the trial court.[10]

See Majority op. at 1-10.

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[10]The entire analysis and findings of the trial court are set out in less than two (2) pages that state:

The great bulk of all the testimony received by the Court centers around counsel's alleged ineffective assistance during the penalty phase. Both trial co-counsel, Dubiner and Petitioner's expert, Haughwout, testified in great depth on this issue.

Petitioner also presented the live expert testimony of Jan Vogelsang, a licensed clinical social worker, and Dr. Robert Phillips, a psychiatrist, along with the affidavits of two additional experts. Eight of the remaining nine live witnesses and most of the affiants were lay people, all of who [sic] testified to different aspects about the Petitioner's dysfunctional background. Each stated they could and would have testified during the penalty phase of the trial if called upon to do so.

The nexus of Petitioner's argument under this claim is primarily based upon the allegation that counsel failed to conduct a penalty phase investigation until the conclusion of the guilt-innocence phase; that what investigation was done was totally inadequate and ineffective and failed to present any in-depth mitigating mental health and background evidence.

The sole witness presented by the State was Petitioner's trial co-counsel, Cary Klein. Despite Petitioner's evidence to the contrary, Klein investigated the possibility of mitigating mental health factors. In fact, he obtained the services of one Dr. Villalobos, a psychiatrist, who after interviewing the Petitioner prior to the penalty phase and reviewing psychological tests performed upon the Petitioner, told Klein that he, Dr. Villalobos, had nothing helpful to say about the Petitioner. Dr. Villalobos also told Klein that the Petitioner had told him that he, the Petitioner, had faked mental illness while in prison. Dr. Villalobos further informed Klein that the test results were unfavorable to Petitioner, that petitioner was a sociopath, and that he saw no evidence of organic brain syndrome. Armed with this information together with Petitioner's attempted escapes and long history of incarceration, Klein made a conscious, tactical judgment not to pursue this line of defense in the penalty phase of the trial for fear of opening a Pandora's box.

In view of the overwhelming evidence of guilt coupled with the Petitioner's extensive criminal and juvenile background, his admissions at the time of the trial, and in light of the 11 to 1 vote to impose the death penalty (which means a minimum of 5 jurors would have had to have voted differently), Petitioner has failed to carry the burden established by the United States Supreme Court in Strickland, i.e. the probability of a different trial outcome.

The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. Once again, we have a lawyer appointed who had absolutely no experience in capital cases. Now, there are many resourceful and talented lawyers who, although lacking specific experience, would be able to learn the system and do an outstanding job of investigating and preparing a defense. However, in this case we have an inexperienced lawyer who has conceded that he was unprepared and, in his words "caught with [his] pants down," because he had erroneously assumed that the trial court would grant a lengthy continuance between the guilt phase and the penalty phase of the proceedings.

We do not have to guess at whether counsel did a proper investigation and prepared a defense before the penalty phase began: counsel admits he did not. Trial counsel acknowledged under oath that with the denial of a continuance he simply "ran out of time" to properly investigate mitigation. In addition, we have the sworn and unrebutted testimony of co-counsel who says the situation was so bad that he threatened to go to the trial judge and disclose the blatant lack of investigation and preparation. He concedes that he made a serious mistake in not doing so.

In the post-conviction hearing below the appellant presented a vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase. Two brief excerpts from appellant's brief provide a flavor of the information that would have been discovered had a proper investigation of appellant's life been done:

> Billy was sent to youth hall for the first time at age 12. Shortly after he arrived there, he was raped. Two years later, he was sent to the Florida School for Boys at Okeechobee. At Okeechobee, Billy was hog tied, drenched in water and left over night in the "wet room," and frequently sent to the "ice cream room," where he was given thirty licks with straps and paddles, the process being repeated if he cried out during the beating. T. 486, 498; App. 32. He also saw other children be sexually abused, and was placed under the supervision of older and larger

> offenders. T. 205-09. The substandard conditions at Okeechobee are well documented, see generally App. 37, and were described in detail by juvenile justice expert Paul DeMuro. DeMuro described the dangerous, overcrowded conditions in the dormitories, where status offenders were not separated from violent offenders, nor smaller children from larger, leading to frequent physical and sexual assaults on the younger and smaller children; the absence of any attempt to treat or rehabilitate youthful offenders; and the fact that small, middle class white boys without a history of institutionalization (like Billy Van Poyck when he was first sent to Okeechobee) were at the greatest risk. T. 391-32.
>
> . . .

Approximately two years after Billy was sent to adult prison, he suffered a breakdown. For most of the next several years he received psychiatric treatment and medication, including "industrial strength" dosages of antipsychotic medications, and two admissions to the Florida State Hospital in Chattahoochee. T. 595-605; see generally Def. Exs. 23, 24..Dr. Rothenberg believes that this breakdown was the predictable result of the failure to provide the type of long term inpatient treatment he had recommended for Billy:

> This subsequent history confirms my initial diagnosis. It is predictable and almost inevitable that a young and vulnerable person, already suffering from psychosis, would deteriorate further when placed in an adult prison, without any therapeutic intervention. In the absence of the type of therapeutic intervention that I recommended, there is no reason to believe that Mr. Van Poyck's mental illness has ever dissipated. While the observability of such a mental illness fluctuates over time and may be masked by medication, the mental illness itself persists.

App. 46.

All of this mitigating evidence was readily available to trial counsel, but none of it was discovered or presented. The reasons

for these failures are not far to seek. Mr. Van Poyck's lead attorney was Cary Klein. Klein was a general litigation attorney who had never before handled a capital case. T. 1041-42. From the beginning of this difficult, complex case Klein believed a felony murder conviction likely, and that the case would almost certainly go to a penalty phase proceeding. T. 1145. Also, at the very outset of the case Klein discussed potential mitigation with Mr. Van Poyck. T. 1060-61. However, Klein did not investigate for mitigation at any time prior to the trial. Instead, he had decided to wait until the guilt phase of the trial was over to begin penalty investigation because he believed that the trial court would give a one to three week continuance between phases. T. 1158. He explained at the hearing that he was counting on this time to "investigate" penalty phase issues and felt safe in doing so because the court had "assured" him that there would be a few weeks between phases. Id. As it turned out, no continuance was forthcoming, and the record contains no written or oral order or promise of a continuance. See T. 1196.

Appellant's Initial Brief at 15, 17-18.

In our previous review of this case we found insufficient evidence of premeditation but affirmed appellant's guilt on a felony-murder theory. In our opinion we upheld the sentence of death and expressly noted that the trial court properly rejected the meager mitigation offered by counsel. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). Knowing what we do now, we should not give our approval to a sentence of death predicated upon a patent case of ineffective assistance of counsel. In doing so we are simply providing additional support to the already considerable body of evidence that the death penalty process is seriously flawed by the legal system's tolerance of incompetent counsel. Of, Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994). Van Poyck is not going anywhere; he has been convicted and imprisoned for first degree murder. His conviction and imprisonment are not in question. We should apply our holding in Deaton v. Dugger and remand this case for a reliable penalty phase proceeding in which evidence of aggravation and mitigation can be presented by counsel prepared on both sides.

KOGAN, C.J. and SHAW, J., concur.

An Appeal from the Circuit Court in and for Palm Beach County,

Walter N. Colbath, Jr., Judge - Case Nos. 87-6736-CF-A02 & 88-11116-CF

Jeffrey O. Davis, Mitchell S. Moser and Ronni M. Flannery of Quarles & Brady, Milwaukee, Wisconsin,

for Appellant

Robert A. Butterworth, Attorney General and Celia A. Terenzio, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CRIMINAL DIVISION "V"

CASE NO. 87 6736 CF A02

WILLIAM VAN POYCK,

Petitioner,

vs .

THE STATE OF FLORIDA,

Respondent.

_____/

ORDER DENYING PETITIONER'S POST CONVICTION RELIEF

This cause came on before the Court on a Rule 3.850 Petition of William Van Poyck for Post Conviction Relief. Specifically, Petitioner sets forth seventeen separate claims in a 271-page petition alleging numerous grounds upon which relief should be granted. The Court held an evidentiary hearing on Claims II (a), (b), (d), (e), (g), (h) and (l), involving ineffective assistance of counsel at the guilt-innocence phase and Claim IV, which dealt with ineffective assistance of counsel at the penalty phase. The Court is able to dispose of all other claims based on the record.

For the purposes of appellate review the Court will first set forth those claims it denies without a hearing and thereafter discuss in more detail the claims upon which an evidentiary hearing was granted.

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

CLAIM I

STATE'S FAILURE TO GRANT PETITIONER ACCESS TO DOC FILES AND RECORDS

This claim was withdrawn by Petitioner.

CLAIM II (c)

FAILURE TO PRESENT EVIDENCE THAT CO--DEFENDANT WAS THE TRIGGER MAN

This claim was considered and denied on direct appeal.

CLAIM II (f)

TRIAL COUNSEL CONCEDED GUILT OF THE UNDERLYING FELONIES OF ROBBERY AND ATTEMPTED ESCAPE

Counsel did not concede guilt although in closing argument he referred to the "escape" and "robbery" (R-2899,2902-03).[1] A part of this issue was addressed on direct appeal, however, given the overwhelming evidence even if true is harmless as it could not conceivably have altered the outcome of Phase I.

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[1]References to Trial Court Record will be as follows: "R" and will refer to the transcript, pleadings and orders numbered 1-4260.

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

CLAIM II (i)

FAILURE TO ARRANGE FOR DNA TESTING

On direct appeal, the Florida Supreme Court stated there was insufficient evidence of premeditated murder, but clearly held that there was sufficient evidence to convict of felony murder. Accordingly, the results of any DNA testing would not have altered the outcome of Phase I.

CLAIM II (j)

FAILURE TO PRESERVE A BATSON/NEIL/SLAPPY[2] VIOLATION

This ground involved two jurors, both of whom Defense objected to on the basis of the above three cases. One objection was overruled, the other was sustained. Accordingly, this is waived as it was preserved on the record and could and should have been raised on direct appeal.

CLAIM II (k)

DEFENSE ALLOWED STATE TO SHIFT THE BURDEN OF PROOF REGARDING THE TRIGGER MAN

The record reveals that this was fair comment on the facts by the State and, in any emvent, if improper was a matter that should have been raised on direct appeal, and if not, is waived. (R-2883-2891, 2938A-2946)

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[2]Batson v. Kentucky, 476 U. S. 79 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla. 1988)

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

CLAIM II (m)

FAILURE TO OBJECT TO PROSECUTORIAL COMMENTS

Counsel is not required nor expected to make every conceivable objection. A review of the record indicates that the jury was properly instructed on the law and that the failure to object set forth in the petition fails to rise to fundamental error thereby making objection unnecessary.

CLAIM III

STATE WITHHELD EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND[3]

The alleged evidence is a handwritten note found in the prosecutor's file opining the fatal wound came from the driver's side. It appears to be nothing more than work product but even if it rose to the level of evidence, given the overwhelming inculpatory evidence, it would not have changed the outcome.

CLAIM V

THE AGGRAVATING FACTOR OF KNOWINGLY CREATING A GREAT RISK TO MANY PEOPLE IS UNCONSTITUTIONALLY VAGUE

This claim is procedurely barred because the same has been raised and denied on direct appeal.

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[3]Brady v. Maryland, 373 U.S. 83 (1967)

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

CLAIM VI

DENIAL OF PETITIONER'S CHALLENGE FOR CAUSE REGARDING PROSPECTIVE JURORS

The claim is procedurely barred as it has been raised and denied on direct appeal.

CLAIM VII

IMPROPER PROSECUTORIAL CONDUCT

This issue is procedurely barred as it has been raised and denied on direct appeal.

CLAIM VIII

PETITIONER WAS SENTENCED TO DEATH UNDER THE MISTAKEN BELIEF HE WAS THE TRIGGER MAN.

This issue is procedurely barred as it has been raised and denied on direct appeal.

CLAIM IX

NEW EVIDENCE ESTABLISHES PETITIONER'S INNOCENCE OF THE UNDERLYING FELONY OF AIDING AND ASSISTING ESCAPE

This issue is procedurely barred as it has been raised and denied on direct appeal. Further, the Affidavit of James O'Brien appended to the Petition is not exculpatory and therefore immaterial.

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

CLAIM X

JURY INSTRUCTION ON AN IMPERMISSIBLE AGGRAVATING FACTOR WHICH DEATH QUALIFIED DEFENDANT IN THE FIRST INSTANCE WAS UNCONSTITUTIONAL

This issue is procedurely barred as it has been raised and denied on direct appeal.

CLAIM XI

PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY SHIFTED BURDEN TO THE PETITIONER TO PROVE DEATH INAPPROPRIATE

This issue is procedurely barred as it could have and should have been raised on direct appeal and accordingly, is waived.

CLAIM XII

IMPERMISSIBLE SYMPATHY COMMENTS IN VIOLATION of LOCKETT v. OHIO[4]

This claim is procedurely barred for failing to raise same on direct appeal.

CLAIM XIII

VIOLATION OF THE ENMUND/TISON[5]

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[4]Lockett v. Ohio, 438 U.S. 586 (1978)

[5]Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987)

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

DOCTRINE

This claim is procedurely barred as the same has been raised and denied on direct appeal.

CLAIM XIV

FAILURE OF THE TRIAL COURT TO CONDUCT AN INDEPENDENT EVALUATION OF MITIGATING EVIDENCE IN ITS SENTENCING ORDER

This claim is procedurely barred as the same has been raised and denied on direct appeal.

CLAIM XV

PENALTY PHASE INSTRUCTIONS TO THE JURY WERE UNREASONABLY VAGUE AND CONFUSING

This claim is procedurely barred as the issue has been raised and denied on direct appeal.

CLAIM XVI

THE DEATH SENTENCE WAS BASED ON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION

This issue is procedurely barred as the same has been raised and denied on direct appeal.

CLAIM XVII

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO REINSTRUCT JURY ON THE LONG FORM DEFENSES OF JUSTIFIABLE AND EXCUS-

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

ABLE HOMICIDE DURING ITS INSTRUCTION ON MANSLAUGHTER.

This claim is denied or procedurely barred for the following reasons:

A. It is waived because no such request was made in the trial court.

B. It is waived because the same should have and could have been raised on direct appeal.

C. In any event, failure to do so in light of the entire instructions given to the jury is harmless error.

ISSUES UPON WHICH THE COURT GRANTED AN EVIDENTIARY HEARING

An evidentiary hearing was conducted which lasted five days during which the Court heard from 14 separate witnesses and considered 22 additional affidavits on the following issues.

CLAIM II

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL

a. Counsel knowingly presented a defense that was not viable.

b. Counsel failed to investigate or present a defense of voluntary intoxication.

d. Counsel failed to pursue a Motion for Change of Venue.

e. Counsel failed to ensure that jurors were subject to individual voir dire.

g. Counsel failed to attack the State's testimony of their key

witness, Officer Steven Turner.

h. Counsel failed to object to the prejudicial trial atmosphere.

l. Counsel inexcusably relied upon the advice and wishes of Petitioner in preparing and presenting his case.

Of the fourteen witnesses who testified during the 5-day hearing, thirteen were presented by the Petitioner, eleven of who testified solely on issues relating to Claim IV. The remaining two, namely Michael Dubiner, Petitioner's co-counsel at trial who testified to the ineffectiveness of both himself and co-counsel Klein, and Carol Haughwout, a highly respected and outstanding local trial lawyer, gave testimony on issues involved in both Claims II and IV.

All of the claims upon which evidentiary hearing was granted are grounded upon trial counsel's ineffectiveness during both Phase One and Phase Two of the trial.

The standard upon which the Court must measure trial counsel's effectiveness is enunciated in Strickland v. Washington, 466 U.S. 668 (1984). That standard is two-pronged in that Petitioner must first show that counsel's performance was deficient and second, that counsel's performance either by omission or commission, was so serious that the Defendant was deprived of a fair trial and that absent same there is a strong presumption that the outcome of the trial would probably have been different.

CLAIM II (a); (b); (l)

These three claims center around the underlying issue of a viable defense. Trial co-counsel, Michael Dubiner, testified that the case was "a loser in the guilt phase", that there was "no doubt that the verdict would be guilty", and that "any defense would have led to a first degree murder conviction". Petitioner's expert on the defense of first degree murder cases, Carol Haughwout, also testified that there was no viable Phase One defense. Accordingly,

under the doctrine set forth in Strickland, Petitioner's claim on these three issues is DENIED.

CLAIM II (d); (e); (h)

These three issues involve venue, voir dire and the general trial atmosphere regarding prejudicial pre-trial publicity. Petitioner has the burden of proving that he did not receive a fair and impartial trial because of pre-trial publicity, jury selection or the general atmosphere of the trial itself.

Neither of Petitioner's two witnesses who testified regarding Phase One of the trial, i.e. Michael Dubiner, and Carol Haughwout, testified in any detail about these three issues. Therefore, Petitioner has failed to factually support these claims and accordingly, under the Strickland doctrine, relief thereon is hereby DENIED.

CLAIM II (g)

Under this issue Petitioner claims that counsel failed to attack testimony of the State's key witness, Officer Turner. Although Petitioner set forth minimal testimony that suggested that counsel's cross-examination of Turner was unclear and that certain evidentiary points were not addressed, Petitioner does not establish any support that the impeachment of Turner would have produced a different result at trial. Accordingly, Petitioner fails to satisfy the test set out in Strickland, and accordingly, relief under this claim is hereby DENIED.

CLAIM IV

COUNSEL FAILED TO INVESTIGATE AND PRESENT READILY AVAILABLE MITIGATING EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

Case No. 87 6736 CF A02
William Van Poyck v.
The State of Florida

The great bulk of all the testimony received by the Court centers around counsel's alleged ineffective assistance during the penalty phase. Both trial co-counsel, Dubiner and Petitioner's expert, Haughwout, testified in great depth on this issue.

Petitioner also presented the live expert testimony of Jan Vogelsang, a licensed clinical social worker, and Dr. Robert Phillips, a psychiatrist, along with the affidavits of two additional experts. Eight of the remaining nine live witnesses and most of the affiants were lay people, all of who testified to different aspects about the Petitioner's dysfunctional background. Each stated they could and would have testified during the penalty phase of the trial if called upon to do so.

The nexus of Petitioner's argument under this claim is primarily based upon the allegation that counsel failed to conduct a penalty phase investigation until the conclusion of the guilt-innocence phase; that what investigation was done was totally inadequate and ineffective and failed to present any in-depth mitigating mental health and background evidence.

The sole witness presented by the State was Petitioner's trial co-counsel, Cary Klein. Despite Petitioner's evidence to the contrary, Klein investigated the possibility of mitigating mental health factors. In fact, he obtained the services of one Dr. Villalobos, a psychiatrist, who after interviewing the Petitioner prior to the penalty phase and reviewing psychological tests performed upon the petitioner, told Klein that he, Dr. Villalobos, had nothing helpful to say about the Petitioner. Dr. Villalobos also told Klein that the Petitioner had told him that he, the Petitioner, had faked mental illness while in prison. Dr. Villalobos further informed Klein that the test results were unfavorable to Petitioner, that petitioner was a sociopath, and that he saw no evidence of organic brain syndrome. Armed with this information together with Petitioner's attempted escapes and long history of incarceration, Klein made a conscious, tactical judgment not to pursue this line of defense in the penalty

phase of the trial for fear of opening a Pandora's box.

In view of the overwhelming evidence of guilt coupled with the Petitioner's extensive criminal and juvenile background, his admissions at the time of the trial, and in light of the 11 to 1 vote to impose the death penalty (which means a minimum of 5 jurors would have had to have voted differently), Petitioner has failed to carry the burden established by the United States Supreme Court in Strickland, i.e. the probability of a different trial outcome.

Accordingly, and the Court being otherwise advised in the premises, Petitioner's Rule 3.850 Petition is hereby DENIED.

DONE AND ORDERED this 8th day of July, 1994, in chambers at West Palm Beach, Palm Beach County, Florida.

_____

WALTER N. COLBATH
Circuit Court Judge

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APPENDIX C

SUPREME COURT OF FLORIDA

Tuesday, May 27, 1997

WILLIAM VAN POYCK,
Appellant,

v. Case No. 84,324

STATE OF FLORIDA, Circ.Ct.Nos. 87-6736-CF-A02
Appellee. (Palm Beach) 88-11116-CF

Appellant's Motion for Rehearing and for Oral Argument filed in the above cause is hereby denied.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur
KOGAN, C.J., SHAW and ANSTEAD, JJ., dissent

A true copy TC

TEST:

Sid S. White
Clerk, Supreme Court

cc: Hon. Dorothy H. Wilken, Clerk
Hon. Walter N. Colbath, Jr., Judge

Mr. Jeffrey O. Davis
Ms. Ronni M. Flannery
Mr. Mitchell S. Moser
Ms. Celia A. Terenzio